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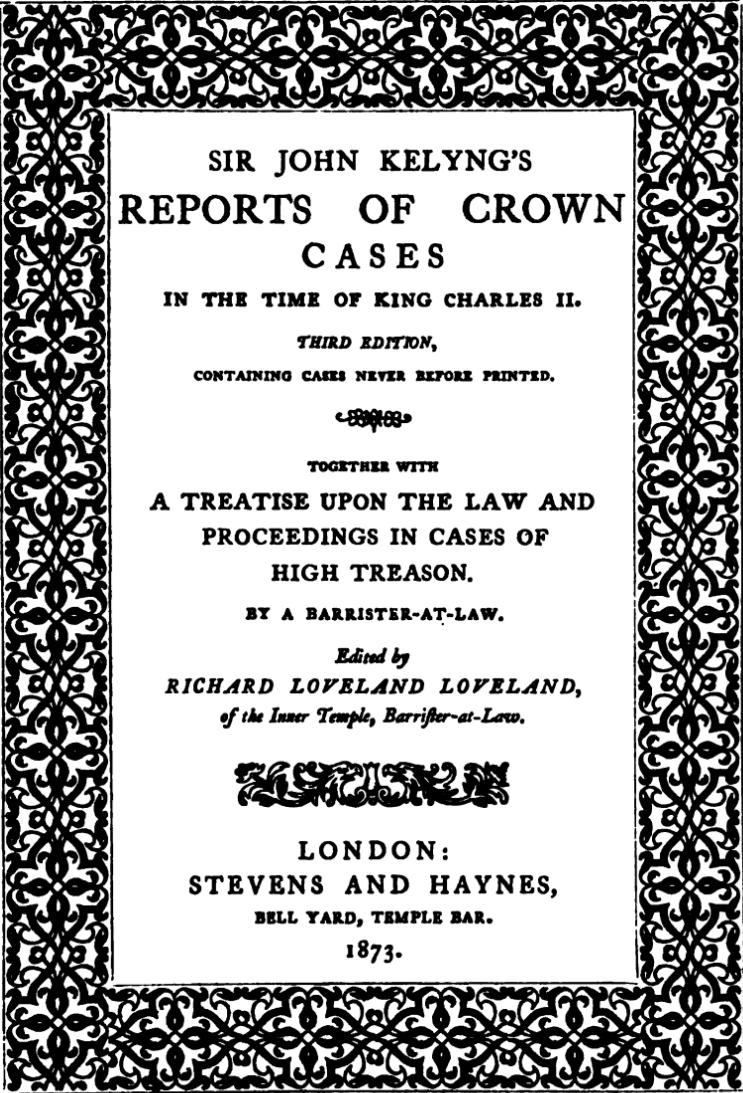






SIR JOHN KELYNG'S CROWN CASES.





SIR JOHN KELYNG'S
REPORTS OF CROWN
CASES

IN THE TIME OF KING CHARLES II.

THIRD EDITION,
CONTAINING CASES NEVER BEFORE PRINTED.

— 589 —

TOGETHER WITH
A TREATISE UPON THE LAW AND
PROCEEDINGS IN CASES OF
HIGH TREASON.

BY A BARRISTER-AT-LAW.

Edited by
RICHARD LOVELAND LOVELAND,
of the Inner Temple, Barrister-at-Law.



LONDON:
STEVENS AND HAYNES,
BELL YARD, TEMPLE BAR.

1873.





ADVERTISEMENT.

THERE have been two editions of Sir John Kelyng's Crown Cafes; the first published in London, 1708, folio, and the second, Dublin, 1789, octavo. Neither of these contain all the cafes Sir John Kelyng collected and left in MS. In a copy of the folio edition which recently came into our possession there is written, by an unknown hand, the following note on the margin of the page containing Lord Chief Justice Holt's address to the *Reader* :—

“ But not all, for he had collected more cafes, and had two MSS. collections of his own reports in ye crown law, and these here printed are in ye one MSS. (tho' not all, but most fitt to be printed for publike use). Ye other MSS. had some considerable cafes in it (as his son Sir John Keyling told me), those of ye Ch. Ju. Keyling in ye first volume or MSS. not here printed. I have added in ye
spare

spare paper in this book with reference to ye place where they should come in had they been here printed so wth what printed and in ye spare paper wrote makes one of the MSS."

The additional cases referred to in the above note are given in this edition, and for the purpose of readily distinguishing them are printed in red ink.

The "Treatise on High Treason," (first printed 1793) at the end of this volume being a kindred subject, and, moreover, containing numerous references to Kelyng, we considered would form an interesting appendix.

The whole work has been most carefully revised, and the references verified (those to Hale, Hawkins, and Foster being to the last editions of those writers), by RICHARD LOVELAND LOVELAND Esq., Barrister-at-Law, whose scrupulous care we most thankfully acknowledge.

It is to the careful editorship of our series of reprints we attribute the gratifying success which has rewarded our enterprise, and given occasion for the flattering encomiums we have received from so many quarters.

THE PUBLISHERS.

September, 1873.

A
R E P O R T
Of Divers
C A S E S
I N

Pleas of the Crown,
Adjudged and Determined ;

In the Reign of the late

King Charles II.

With Directions for JUSTICES of the PEACE
and Others.

Collected

By Sir *John Kelyng*, K^{nt}.

Late LORD CHIEF JUSTICE of His MAJESTY'S
COURT of KING'S BENCH.

From the Original Manuscript, under his own Hand.

To which is added, The Reports of Three Modern Cases, *Viz.*
Armstrong and Lisle; The KING and *Plummer*; The QUEEN
and *Mawgridge*.

LONDON,

Printed for Isaac Cleave, next Door to *Serjeants-Inn* in
Chancery Lane, 1708.

WE do allow and approve of the Printing and
Publishing the Reports and Cases in Pleas of the
Crown, collected by the late Lord Chief Justice
Kelyng, and three other Modern Cases added there-
unto.

J. HOLT,
JOHN POWELL,
LITTLETON POWYS,
H. GOULD.

READER,



R E A D E R,


HERE can be nothing more said to recommend these Cases to your Perusal, than to assure you they are the Collection of Sir *John Kelyng*, Knt. sometime Chief Justice of the Court of King's Bench; the Manuscript whereof under his own Hand was in the Custody of his Grandson and Heir; Copies whereof were dispersed in several Hands, which might hereafter be published to the Injury of the Author, and Disadvantage of the Publick.—There are two *Quæres* inserted in the Margent by the Publisher, the one is Page 13, the other Page 41, which may be fit to be considered by the Learned.

The three Modern Cases are conceived to be of some Use, therefore are thought fit to be published; and if they shall be found to be of any Benefit, its what is desired by the Publisher thereof.

FAREWEL.



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DIRECTIONS FOR JUSTICES OF THE PEACE.

ORDERS and DIRECTIONS to be observed by the Justices of the Peace, and others, at the Sessions in the Old Baily, for London and Middlesex, made 16 Car. 2. by Sir Robert Hyde, Chief Justice of the King's Bench; Sir Orlando Bridgeman, Chief Justice of the Common Pleas; Sir Thomas Twissden, one of the Judges of the King's Bench; Sir Thomas Tyril, one of the Judges of the Common Pleas, and Sir John Kelyng, one other of the Judges of the King's Bench, and signed by them all, and Read in open Court, and ordered to be filed by the Clerk, that all Justices might take Copies by them if they please: For that they shall not for the Future pretend Ignorance of their Duty.

I.

WHAT all Recognizances and Bailments taken by any Justice of the Peace, be certified into the Court the first Day of every Sessions before Noon, for that they being kept longer out, it often happens that Felons and other Offenders escape the Prosecutors, Witnesses, and Parties being wearied out

2 Hawk. 31,
54. 173.

B

out

2 *Directions for Justices of the Peace.*

out with Delays and Attendance, beside many other great Mischiefs; and that the Justices of Peace who are faulty herein be fined by the Justices of Goal Delivery, according to the *Stat. of 1 & 2 Ph. & Ma. cap. 13.* and *2 & 3 Ph. & Ma. cap. 10.*

2. If the Offenders appear not upon their Recognizances the first Day, the Default to be Recorded, and the Recognizance to be forfeited; Nevertheless Procceses or Warrants, as the Case shall require, to go out against them and their Bail; so likewise as to those who are bound to give in Evidence, that if possible the Business be not deferred to another Sessions, in which time commonly the Prosecutors and Witnesses are taken off, and the Matters compounded.

1 Hale, 585.
Bull, Ni. Pri.
242. (n.)
1 Stark, R. 242.
2 Stark, 366.
Holt, N. P. C.
597.
7 B. & C. 623.
1 M. & R.
299.
1 M. CCR.
186.

3. That all Justices of the Peace do take Examinations both of the Felons *without Oath*, and the Informers and Witnesses against them upon Oath in Writing before they commit the Offenders to the Goal, and certify the same the first Day of the Sessions, that they may be ready upon the Tryal of the Felons, or else to be fined according to the Statutes of *Ph. & Mary* before mentioned.

4. That all Prisoners for Treason and Felony be according to Law, sent to the common Goal, which is *Newgate*, and not to the *New-Prison*. It being found by Experience that they are often set at Liberty there without Tryal.

5. That no Prisoner for Felony be discharged [3] during the Interval of Sessions, unless it be upon good Bail taken, the Warrant or Mittimus to the Goaler to keep them until they are delivered according to Law, nor any Bail or Recognizance for Appearance to be given up or withdrawn by the Justice of Peace after the Same is taken, but be returned and certified to the Sessions or Goal Delivery, the Offender

Directions for Justices of the Peace. 3

sender whether Justice of Peace or Goaler to be severely proceeded against.

6. If any Justice of the Peace shall take Bail where he ought not, or wittingly or willingly take insufficient Bail, and the Party appear not, the said Justice not only to be proceeded against according to Law, but likewise to be complained of to the Lord Chancellor, that he may be turned out of his Commission.

7. That no Copies of any Indictment for Felony be given without special Order upon Motion made in open Court, at the General Goal Delivery upon Motion, for the late frequency of Actions against Prosecutors (which cannot be without Copies of the Indictments) deterreth People from Prosecuting for the King upon Just Occasions.

8. That the Goalers make more perfect Kalendars than of late they have done, according to the *Stat. H. 7 cap. 3.* and insert not only Persons in their Custody, but also such as have been in their Custody since the last Sessions, and Bailed or Delivered out, and by whom. 3 Hen. 7, cap. 3.

[4] 9. That if any *Habeas Corpus* come to receive a Prisoner from another Goal, the Goaler to take notice of the Offence for which he stood Committed at the other Goal, and to inform the Court, that if he shall happen to be acquitted, or have his Clergy, he may yet be remanded to the former Goal, if there be Cause.

10. If any *Habeas Corpus* come to the Goalers to remove a Prisoner, that with the Prisoner they also certify the Cause for which he stood there committed. It being found by Experience, that by Colour of *Habeas Corpus* to receive and remove Prisoners, many notorious Offenders do Escape.

11. That no Prisoner convicted for any Felony,
for

4 *Directions for Justices of the Peace.*

for which he cannot have his Clergy (unless it be Women, in such Cases, where if had they been Men, they might have had Clergy) be reprieved, but in open Sessions, and not otherwise, without the King's express Warrant, and not by order of any the Justices of Goal Delivery, or *Oyer and Terminer*.¹

12. That such Prisoners as are reprieved, with intent to be transported, be not sent away as perpetual Slaves, but upon Indentures betwixt them and particular Masters, to serve in our *English* Plantations for seven Years, and the three last Years thereof, to have Wages, that they may have a stock when their Time is expired; and that an Account be given thereof, and by whom they are sent, and of their Arrivals.²

13. For that it hath frequently happened of late, [5] that some have been killed upon Duels, others upon suddain Quarrels in the Streets. And the Inhabitants neglect to apprehend the Murderers, or to make Huy and Cry after them, and so the Persons not only escape, but no direct Knowledge can be given who they are. And by the Law, if any Man be slain in the Day, and the Fellow not taken, the Township ought to be amerced; that therefore when any such case appeareth at *Newgate*, as it too often doth, upon the acquittal of Persons apprehended upon Suspicion, that both the Coroner, as also the Secondaries at *Newgate* be required to attend the Judges
of

¹ As to the Nature of the Benefit of Clergy, or rather of the Statute at this Day, see 2 Hawk. Cap. 33. *per totum*, & 4 Black. Com. 333.

² For the modern rule, as to transportation, see 1 Hawk. p. 426. App. 13th, *per tot.* and 2 Hawk. Tit. Transportation, p. 507.

Directions for Justices of the Peace. 5

of the King's Bench, that Information may be put in that Court against the Townships for the escape, and followed *pro Rege*; and at the next Sessions at *Newgate*, give an Account what is done.

Ro. Hyde,
Orl. Bridgeman,
Tho. Twissden,
Tho. Tyrell,
John Kelyng.





HIGH-TREASON.

[7]



AFTER the happy Restauration of King Charles the Second to his Right of the Crown of *England*, which was in *May*, 1660, several Persons who were apprehended for the Murder of his Father, were now to be indicted for that horrid Treason, and in order thereto, the then Judges, who, at that Time were only the Lord *Bridgeman*, then Chief Baron of the Exchequer; Justice *Foster*, and Justice *Hide*, then Judges of the Common Pleas, and Justice *Mallet*, then Judge of the King's Bench, met several times, at *Serjeants-Inn* in *Fleet-street*, with Sir *Jeffry Palmer*, the King's Attorney, and Sir *Heneage Finch*, the King's Solicitour, Sir *Edward Turner*, Attorney to the Duke of *York*; Mr. *Wadham Windham*, of *Lincoln's Inn*, and myself, being by special Order to attend that service as Counsel for the King, there being then no King's Serjeant, but Serjeant *Glanvill*, Serjeant to the late King, who was then Old, and Infirm: And in order to the proceeding in that great Affair, I was appointed to make as many

Resolutions of all the Judges upon the Case of the King's Murderers.

Queries

Queries as I thought fit to be advised upon ; which, I did accordingly, and upon them, these Things following were resolved.

2 St. Tr. 301.
Tryal at Goal
Delivery, with
a Commission
of Oyer and Ter-
miner joyned
with it, better
than a Tryal by
a special Com-
mission of Oyer
and Terminer.
2 Hawk, 17,
28, 54.

1. That it was better to try those Traitors at the Sessions at *Newgate*, by Commission of Goal Delivery, than only by special Commission of Oyer and Terminer ; because then they might be proceeded against more speedily, and arraigned and tryed immediately, by the Commission of Goal Delivery, and Tales might be immediately returned at the Goal Delivery. And accordingly writs were ordered to be made and sent to the Lieutenant of the *Tower*, in whose Custody the Prisoners then were to deliver them to the Sheriffs of *London*, and Writs to the Sheriffs of *London* to receive them, that they might be in *Newgate*, which was done accordingly. And because, by an Act of Parliament or Convention which sat at the King's coming in English Proceedings were continued until *Michaelmas* now close at hand, but not yet come ; Therefore those writs to the Lieutenant of the *Tower* and Sheriff of *London*, were ordered to be in *English*.¹ [8]

2. It was agreed that all the Prisoners should be arraigned the first Day before any of them were brought to Tryal, and the next Day to proceed to Tryal with one or more of them together, as should be thought fit upon the place.

King's Council
may privately
give Evidence
to the Grand
Jury.

3. It was resolved that any of the King's Council might privately manage the Evidence to the Grand Inquest, in order to the finding of the Bill of Indictment,

¹ All Law Proceedings are now in English by 4 Geo. 2. Cap. 26. 6 Geo. 2. Cap. 14, in *England* ; and by 11 Geo. 2. Cap. 6, in *Ireland*. See some Observations on this Alteration, in 3 Black. Com. 322.

ment, and agreed that it should be done privately ; it being usual in all Cases, that the Prosecutors upon Indictments are admitted to manage the Evidence for finding the Bill ; and the King's Council are the only Prosecutors in the King's Case, for he cannot prosecute in Person.

4. It was resolved that the Indictments should be for compassing the Death of the late King (the very compassing and imagining the King's Death, being the Treason within the *Stat. 25 Ed. 3.*)¹ and then that we might lay as many Overt Acts as we would, to prove the compassing of his Death : But it was agreed, the actual Murder of the King should be precisely laid in the Indictment, with the special Circumstances as it was done, and should be made use of as one of the Overt Acts, to prove the compassing of his death.

5. It was resolved that if any one Overt Act tending to the compassing the King's Death, be laid in the Indictment. That then any other Act which tends to the compassing the King's Death, may be given in Evidence together with that which is laid in the Indictment.

[9] 6. It was resolved that there need not be two Witnesses to prove every Overt Act, tending to the compassing of the King's Death. But one Witness to prove one Overt Act tending to the compassing of the King's Death, and another Witness to prove another Act tending to the same end, are sufficient ; for compassing the King's Death is Treason. And then if two several Witnesses prove two several Acts tending to the compassing the King's Death, the Treason

Compassing the King's Death in the Treason.
1 Hawk. 9.
1 H. P. C. 108.
Foff. 194.
Prin. P. L. 123.
3. Inst. 12.

Overt Act not laid in Indictment may be given in Evidence. This is altered by the Statute of 7 W. 3. c. 3. f. 8.
Foff. 236, 237.
3 St. Tr. 204.
Sir T. Raym.
S. C. 407.
2 Hawk. 353.
2 H. P. C. 287.

¹ [25 Ed. 3. St. 5. c. 2.]

Treason is proved by two Witnesses as the Law in Case of Treason requireth.

Finding others
guilty in the
same Indict-
ment, no cause
of Challenge.
2 Hawk. 578.
4 St. Tr. 704.

7. It was resolved that if several Persons be indicted together in one Indictment for one Crime, in case some of them be found guilty by one Jury, and afterwards some of the same Jury be returned for Tryal of others in the same Indictment; it is no Challenge for those Prisoners to say, that those Jurors have already given their Verdict, and found others guilty who are indicted in the same Indictment for the same Offence; for though they are all indicted in the same Indictment for the same Offence, yet in the Law it is a several Indictment against every one of them, and the Crime is several, and one may be guilty and not another, and the Jury are to give their Verdict upon particular Evidence against every several Person, and therefore the finding one guilty, is no Argument or Presumption that those Jurors will find another guilty.

Severing of the
Pannel.
2 Hawk. 563.
2 Hale, 263.

8. It was resolved that if several Prisoners be put upon one Jury, and they challenge peremptorily, and sever in their Challenges, that then he who is challenged by one, is to be drawn against all, because the Pannel being joint, one Juror cannot be drawn against one and serve for another. But in such case it was agreed the Pannel might be severed, and that the same Jury may be returned betwixt the King and every one of the Prisoners, and then they are to be tried severally, and there the Challenge of one Prisoner is no Challenge to disable the Juror so challenged against another Prisoner. And the case of Dr. *Ellis's* Servant, *Pl. Com.* 100, 101, was agreed to be good Law, as to the severing of the Pannels in that case; and accordingly afterwards upon the tryal of *Harrison* and others, who challenged peremptorily,

2 Stat. Tr.
304, 313.

emptorily, and severed in their challenges, particular Jurors, the Panels were severed.

[10] 9. It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defence, be their Crime never so great. And accordingly upon the Arraignment and Tryal of *Hewlet* and others, who were brought in Irons, the Court commanded their Irons to be taken off.¹

Irons to be taken from Prisoners at their Tryal. *Bracton*, 137. 3 *Inft.* 34. 35. *Sum.* 212. 2 *Hale*, 219. 2 *St. Tr.* 303. 2 *Hawk.* 434. and in notes 2 *St. Tr.* 386. 2 *Hawk.* 319.

10. It being agreed that the Murder of the King should be specially found, with the Circumstances in the Indictment. And it being not known who did that villainous Act; it was resolved, that it should be laid that *Quidam ignotus*, with a Visor on his Face did the Act; and that was well enough, and the other Persons be laid to be present, aiding and assisting thereunto.

Quidam ignotus.

11. The compassing the King's Death, being agreed to be laid in the Indictment, to be 29 Jan. 24 Car. Primi, and the Murder on the 30th of the same Jan. It was questioned in which King's Reign the 30th Jan. should be laid to be, whether, in the Reign of King *Charles* the first, or King *Charles* the second, and the Question grew, because there is no Fraction of a Day, and all the Acts which tended to the King's Murder, until his Head was actually severed from his Body, were in the time of his own Reign, and after his Death in the Reign of King *Charles* the second. And though it was

No Year laid for one Act.

¹ In *Layer's Case*, A. D. 1722, a Distinction was taken between the Time of Arraignment and the Time of Trial; and accordingly *Layer* stood at the Bar in Chains during the Time of his Arraignment. 4 *Black. Com.* 322. 6. *St. Tr.* 230.

was agreed by all, except Justice *Mallett*, that one and the same Day might in several respects, and as to several Acts, be said to be intirely in two Kings Reigns, so that in some respects the whole Day may be ascribed to one, and in other respects, the whole Day ascribed to the other, according to the Truth in the Matters of fact which were acted, either in the Life, or after the Death of the first King, yet because Justice *Mallett* was earnest that the whole Day was to be ascribed to King *Charles* the second, therefore it was agreed, that in that place, no Year of any King should be named, but that the compassing of the King's Death should be laid on the 29th Jan. 24 Car. *Primi* and the other Acts tending to his Murder, and the Murder itself laid to be *Tricesimo Mensis ejusdem Januarii*, without naming any Year [11] of any King, which was agreed to be certain enough.

a Hawk. 325.
Bur. 1901.
S. P.

Contra pacem of
two Kings.

12. It being agreed that the Indictment should be for compassing the King's Death, and one of the Overt Acts to be the actual Murder of the King: It was resolved the Indictment should conclude *contra pacem nuper Domini Regis Coron' & dignitat' suas, Nec non contra pacem Domini Regis nunc Coron' & dignitat' suas.*

Chief Judge
giveth Judg-
ment in Treas-
on.

13. The Question was put, whether the Recorder of *London* should give the Charge to the grand Inquest at *Hick's-Hall*, where the Indictment was to be found, the Fact being in *Middlesex*; And also whether Judgment at the Sessions-house, where the Prisoners were to be tryed, should be there given by the Recorder, or whether the Charge and the Judgment should be given by the Chief Judge: And it was agreed that both should be given by the Chief Judge. And accordingly this was done by my Lord *Bridgeman*, and he gave the Charge only relating to enquire of the Murderers

The Day was
Tuesday, 9th of
O^{cto}. 12 Car.
24.

Murderers of the late King, without mixing any other matter then to be enquired of : And after the Charge, one Indiſtment was preferred againſt all the King's Murderers, who were in Priſon, and alſo againſt ſeveral others who were not then apprehended, but agreed they ſhould be attainted by an Outlawry upon the ſame Indiſtment. And the ſame Day the Indiſtment was found, and the next Day delivered at the Goal Delivery, in the Sessions-houſe in the *Old Baily*, which Day all the Priſoners were arraigned, and pleaded not guilty, but afterward ſome of them withdrew their Plea, and confeſſed the Indiſtment, viz.

14. Sir *Hardres Waller*, and *Geo. Fleetwood*, which was accordingly recorded by the Court, and agreed by all the Judges, that it might be done, altho' the Clerk had recorded their Plea of not guilty ; for the Entry is, that ſuch a one *poſtea*, or *reliſta verificatione cognovit Indiſtamentum*.

Confefſion after
not guilty
pleaded.
2 Hawk. 466.
2 St. Tr. 303.

[12] 15. *Memorandum*, That upon the Arraignment of *Henry Martyn*, his Name being ſo written in the Indiſtment, he ſaid his Name was *Marten*, and not *Martyn* ; but the Court agreed that he being known by that Name of *Martyn*, that was well enough in an Indiſtment, tho' it be not ſpelled directly as he ſpelleth it.

Variance in
Letters of Sir-
name.
2 St. Tr. 238.
2 Hawk. 317.
2 Hale, 238.

Memorandum, That the Indiſtment was in *Latin*, it being preferred after *Michaelmas*, until which time, all *Engliſh* Proceedings were allowed by that Convention which was ſitting when the King was reſtored.

And after, all the Priſoners who pleaded not guilty, were convicted upon full Evidence, and had Judgment of High-Treason.

Memorandum, That Secretary *Morris* and Mr. *Anneſley*, Preſident of the Council, were both in Commiſſion

Commissioners
for Tryal, give

evidence as
Witnesses.
Hacker's Case.
2 St. Tr. 384.
2. Hawk. 601.

Commission for the Tryal of the Prisoners, and fate upon the Bench, but there being occasion to make use of their Testimony against *Hacker*; one of the Prisoners, they both came off from the Bench, and were sworn, and gave Evidence, and did not go up to the Bench again during that Man's Tryal; and agreed by the Court they were good Witnesses, tho' in Commission, and might be made use of.

2 St. Tr. 341.

16. Upon the Tryal of *Coke of Gray's-Inn*, who was of Council against the King, and delivered in the Charge against the King in the Traiterous Court called the High Court of Justice; he objected that he did not draw up the Charge; but he only acted as a Counsellor, and did only speak Words to have the Charge read, and demanded Judgment against the King; and he said Words did not make Treason.

Acting a Coun-
sel, not excuse
for Treason.
2 St. Tr. 341.

17. It was resolved by the Court, that if a Paper containing treasonable matter, be indicted by another, yet being known by *Coke* to contain treasonable matter, and being delivered by him as a Charge against the King to take away his Life, this is an Overt Act to prove that he compassed the King's Death, which is the Treason he is Indicted for.

Approbation in
High-Treason
maketh guilty.
1 H. P. C. 127.

18. And in the Case of High Treason, If any one do any thing by which he shewed his liking and Approbation to the Traiterous Design, this is in him High-Treason: For all are Principals in High Treason, who contribute towards it by Action or Approbation.

Words are an
Overt Act to
prove Treason.
1 Hawk. 13 &
15, & in notis.
1 H. P. C. 116.

19. And it was resolved that tho' in case a Man [13] be indicted only for Words, that is not High-Treason. But if a Man be indicted for compassing the King's Death, there Words may be laid as an Overt Act to prove that he compassed the Death of the King,

King, as it was in the Case of *Croftagan*, who being beyond Sea, spake these Words, *I will kill the King, if I can come at him*; and afterwards he came to *England*, and was taken and indicted for compassing the King's Death, and these Words laid as an Overt Act, and proved,¹ and he had Judgment of High-Treason. And *Co. Pl. Cor.* 14. agreeth, that Words set down in writing, are an Overt Act to prove the compassing the King's Death, as in the Case of Cardinal *Pools* there cited, and Words spoken are the same thing if they be proved; and Words are the natural way for a Man whereby to express the Imagination of the Heart. If it be any way declared that a Man imagineth the King's Death, that is the Treason within the *Stat. 25 Edw. 3, 2 St. 5, cap. 2.*

Cro. Cor. p. 332. *Fost.* 202. Though *Co. Pl. Cor.* 14 be against this Opinion, yet it was agreed that was no Law. Yet, *Quere*, because of the different Opinions; but Words will explain the meaning of an Act.

20. Memorandum

¹ From this Case thus cited and the Rule that is grounded on it, a Reader would be induced to conclude that the Words were the *only* Overt Act laid in the Indictment; but that is not the Case, for besides the Words, the Indictment further charged that he came into England for the Purpose of killing the King. *Foster's Crown Law*, 203. 1 *Hal.* 116.

² Kelyng seeth no difference between Words *spoken and written*, which is this seditious *Writing*; are permanent Things, and if published they scatter the Poison far and wide, they are Acts of Deliberation capable of Proof, not liable to Misconstruction, but are naked and undisguised as they came out of the Author's Hand: Words are transient, and fleeting as the Wind, the Poison they scatter, confined to a narrow Circle of a few Hearers, they are frequently the Effect of sudden Passion, easily misunderstood and often misrepresented. *Foster's Crown Law*, p. 204. And it has been laid down on more Occasions than one since the Revolution, that loose Words not relative to any Act or Design, are not Overt Acts of Treason. 4 *St. Tr.* 581, 645. 1 *Black. Rep.* 37. 1 *Hawk.* 14 in notis. Whether Words only spoken, can amount to an Overt Act of compassing the King's Death, is very well discussed in *H. P. C.* from 111 to 120, and 312 to 322; and in *Foster's*

Acting as a
Soldier by com-
mand of his
Superiour, no
excuse for;
Treason.
That otherwise
was indifferent.
2 St. Tr. 369.
1 Hawk. 10.

*Barkstead, Okey,
and Corbet's*
Case.

2 H. P. C. 407.
Foff. 41.
1 Sid. 72.
1 Lev. 61.
1 Keb. 244.
2 Hawk. 656.
Foff. 111.
8 S. T. 363.
Execution
awarded upon
attainder by
Outlawry.
Immediate
Tryal upon Plea
that the Prison-
ers were not the
same Persons.
1 Wils. 150. 1
Hawk. 3 in no-
tis. Foff. 41.

Sir Hen. Vane's
Case.
2 St. Tr. 435.
1 Hawk. 9, 10.
1 Hawk. 614.
618.

20. *Memorandum*, That upon the Tryal of one *Axtell*, a Soldier, who commanded the Guards at the King's Tryal, and at his Murder; he justified that all he did was as a Soldier, by the command of his superiour Officer, whom he must obey or die. It was resolved that was no excuse, for his Superiour was a Traitor, and all that joyned him in that Act were Traitors, and did by that approve the Treason; and where the command is Traiterous, there the Obedience to that Command is also Traiterous.

Memorandum, That in *Easter Term*, 14 Car. 2d. *John Barkstead*, *John Okey*, and *Miles Corbet*, three of those Persons who presumed to Judge the late King to Death were apprehended, they then being outlawed upon the former Indictment; and they were brought to the King's Bench Bar, and demanded severally what they could say why Execution should not be awarded against them (after the Indictment was first read to them) and they pleaded they were not the same Persons, and thereupon the same Day a Jury was presently returned, the Court sitting; and they found they were the same Persons, and so execution awarded, which was after done accordingly. *Note*, So is the Report in the Manuscript, but the Record is of an Attainder by Act of Parliament; but there might be an Outlawry also.

Memorandum, That in *Trinity Term*, 14 Car. 2. [14]
Sir Hen. Vane was indicted at the King's Bench for compassing the Death of King *Charles* the 2d, and intending to change the Kingly Government of this Nation; and the Overt Acts which were laid, were, that

C. L. 196 to 207; who both conclude against the above Assertion of Kelyng.—Hawkins, however, had doubts on the Subject. 1 Hawk. 15 & in notis.

that he with divers others unknown Persons did meet and consult of the means to destroy the King and Government; and did take upon him the Government of the Forces of this Nation by Sea and Land, and appointed Colonels, Captains, and Officers, and the sooner to effect his wicked Design, did actually in the County of *Middlesex* raise War. And upon his Tryal, he justified that what he did was by the Authority of Parliament, and that the King was then out of Possession of the Kingdom; and the Parliament was the only Power regnant; and therefore, no Treason could be committed against the King: And he objected, that a levying War in *Surrey* could not be given in Evidence to a Jury in *Middlesex*; and he desired to offer a Bill of Exception, because these things were overruled by the Court; and in this Case these Points were resolved by the Court.

The Acts laid were Acts done after the death of King Ch. the first, and before the actual restoring of King Ch. the second.
1 Hawk. 10 & 13.

1. That by the Death of King *Charles* the 1st, that long Parliament was actually determined; notwithstanding the *Acts of Parliament* that it should not be dissolved, but by consent of both Houses. For every Parliament is called to consult with the Person of the King who calleth it; and therefore upon his Death it is determined; for they can no longer consult with him for which end they were called. And a Case was cited to be resolved, that, where, in the 13 of *Q. Eliz.*¹ an *Act of Parliament* was made, that a Commission of *Sewers* should continue for Ten Years, unless the same be determined or repealed by any new Commission, or by *Superdeas*, King *James* granted such a Commission and died within that time; Adjudged, that the Commission was determined; for all

Long Parliament dissolved by Death of the King.
2 St. Trial, 435.

¹ 13 of *Q. Eliz.* cap. 9.

all Commissions are determined by the Death of the King who grants them, and this point of the actual determination of that Parliament by the Death of King Charles the 1st, was before that time resolved by all the Judges of England, as my Lord Bridgeman told me. But note, there were no special Words to continue the Parliament upon the King's Death.

Traitors keep out the King, yet Traitors against him.
1 Hawk. 10-13.

Consulting to destroy the King is an Overt Act to prove the Treason of compassing his Death.

No Bill of Exception in criminal Causes.
2 Hawk. 618.
1 Sid. 84.

2. It was resolved, that tho' King Charles the 2d. [15] was *de facto* kept out of the exercise of the Kingly Office by Traitors and Rebels; yet he was King both *de facto* & *de jure*. And all the Acts which were done to the keeping him out were High-Treason.

3. It was resolved that the very Consultation and Advising together of the means to destroy the King and his Government, was an Overt Act to prove the Compassing of the King's Death.

4. It was resolved that in this Case, the Treason laid in the Indictment being the Compassing of the King's Death, which was in the County of *Middlesex*, and the levying War being laid only as one of the Overt Acts to prove the Compassing of the King's Death, tho' this levying of War be laid in the Indictment to be in *Middlesex*, yet a War levied by him in *Surrey*, might be given in evidence; for being not laid as the Treason, but only as the Overt Act to prove the compassing, it is a transitory thing which may be proved in another County. But if an Indictment be for levying War, and that made the Treason for which the Party is indicted, in that Case it is local, and must be laid in the County where in truth it was.

5. It was resolved, that the Stat. of W. 2. Cap. 31. which giveth the Bill of Exception, extends only to civil Causes, and not to criminal; the Words of the Stat. are, *Cum aliquis implacitatur coram aliquibus Justitiariis*

Justiciarii, &c. And the Intention never was to give such Persons liberty to put in Bills of Exception, for then there would be no Tryals of that Nature ever dispatched in any time, neither here nor in the Circuits, if every frivolous Exception which a Prisoner would make, should be drawn up in a Bill of Exception; besides, the Court is always so far of Council with the Prisoner as to see that he hath right, and if they find any thing doubtful, they of themselves will take time to advise: But the Words of the *Stat.* are plain, as the Court agreed, as to this point.

1 Keb. 304.
1 Lev. 68.
2 Inst. 427.

[16] 6. Altho' the Treason of compassing the King's Death was laid in the Indictment to be the 30th of May, 11 Car. 2. yet upon the Evidence it appeared, that Sir *Hen. Vane*, the very Day the late King was murdered, did sit in Council for the ordering of the Forces of the Nation against the King that now is, and so continued on all along until a little before the King's coming in. It was resolved that the Day laid in the Indictment is not material, and the Jury are not bound to find him guilty that Day, but may find the Treason to be as it was in truth either before or after the time laid in the Indictment; as it is resolved in *Syer's Case*, Co. Pl. Coron' 230. And accordingly in this Case the Jury found Sir *Hen. Vane* guilty of the Treason in the Indictment the 20th of January, 1 Car. 2. which was from the very Day the late King was murdered, and so all his forfeitures relate to that time to avoid all conveyances and settlements made by him¹.

Treason found by the Jury to be several Years before the time in the Indictment.
2 Hawk. 613, 614.

7. Memorandum, That in this Case of Sir *Hen. Vane*,

More than 24

¹ Confirmed by all the Judges to be Law. Lord Balmerino's Case. Foxt. 9. 9 St. Tr. 588. 3 Inst. 230. 1 Hale 367. 2 Hale 179, 201.

may be returned
for tryal of
criminal Causes.
2 St. Tr. 435.

For before that
Stat. of W. 2.
Cap. 38 more
than 24 might
be returned in
civil Causes
which is outed
by that Stat.
save in great
Assize, and that
Stat. does not
extend to
criminal Causes
or Indictments
for the King.
2 Inst. 447.

Tong's Case.
2 St. Tr. 478.
1 Hawk. 9 *et*
seq.

Consulting is
an Overt Act.
1 Hawk. 13.
Fost. 195.

Concealment

Vane, he being to be tryed at the King's Bench Bar, before he came to his Tryal, it was considered by myself, and others then of the King's Council, that it was possible that he might challenge peremptorily, and so defeat his Tryal at that Day, at which it was appointed, if there should be only 24 Jurors returned.

And thereupon, search was made in the Crown Office, and it did appear, that in Tryals on the Crown side for Criminals, the Sheriff might be commanded to return any number the Court pleased; and accordingly, at his Tryal the Sheriff returned about 60 of the Jury; and at Common Law in Civil Causes, it seems the Sheriff might have returned above 24 if he pleased; And therefore by the *Stat. W. 2. Cap. 38*. It is recited, that whereas the Sheriffs were used to summon an unreasonable multitude of Jurors to the grievance of the People; it is ordained that from thenceforth, in one Assize, no more shall be summoned than 24, which *Stat.* extends not to Jurors, returned for tryal of criminal Persons; the like may be done upon a Commission of *Oyer and Terminer*.

Memorandum, That at the Sessions at Newgate, [17] 11. Dec. 14 Car. 2. *Tho. Tong. Geo. Philips, Francis Stubbs*, and several others, were indicted for High-Treason, for compassing the King's Death, and the Overt Acts laid in the Indictment, were assembling themselves together, and consulting and agreeing to destroy the King. *Ac ad easdem proditiones perimplendas*, the consulting to seize *Whitehall*, where the King was Resident.

1. And in this case, It was resolved by all the Judges, that the meeting together of Persons, and consulting to destroy the King, was of itself an Overt Act to prove the compassing the King's Death.

2. It was resolved that where a Person knowing
of

of the Design does meet with them, and hear them discourse of their traitorous Designs, and say or act nothing; This is High-Treason in that Party, for it is more than a bare Concealment, which is *Misprision*, because it sheweth his liking, and approving of their Design; but if a Person not knowing of their Design before, come into their Company, and hear their Discourses, and say nothing, and never meet with them again at their Consultations, that Concealment is only Misprision of High-Treason. But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their Design; and so was Sir *Everard Digby's* Case, who in the Powder Treason met with the Traitors, and heard their Design, but upon the Evidence it was not proved that he said any Thing, or acted any Thing, and he had Judgment of High-Treason.

where it is
High-Treason,
and where but
Misprision.
Post 20.
1 Hawk. 60.

1 St. Tr. 234.

3. It was resolved that some of those Persons who are equally culpable with the rest, may be made use of as Witnesses against their Fellows, and they are lawful Accusers, or lawful Witnesses within the *Stat. 1 Ed. 6. 12. 5 & 6 Ed. 6. Cap. 11. & 1 Mar. 1.* and accordingly, at the Tryal of these men, some of their Partners in the Treason were made use of against the rest; for lawful Witnesses within those Statutes are such as the Law alloweth; and the Law alloweth every one to be a Witness who is not convicted, or made infamous for some Crime. And if it were not so, all Treasons would be safe, and it would be impossible for one who conspires with never so many others to make a discovery to any purpose.

*Persons in the
same Treason,
good Witnesses.*
2 Hawk. 603.

*But see Note to
Hawk. on that
Passage.*
1 H. P. C. 303.
4.

[18] But the *L. C. Baron Hale* said, that if one of these culpable Persons be promised his Pardon, on Condition to give Evidence against the rest, that

disableth

Diversity of
Opinions.
2 Hawk. 607.

disableth him to be a Witness against the others, because he is bribed by saving his Life to be a Witness, so that he takes a difference where the Promise of Pardon is to him for disclosing the Treason, and where it is for giving of Evidence¹. But some of the other Judges did not think the promise of Pardon, if he gave Evidence, did disable him, but they all advised that no such promise should be made, or any threatnings used to them in case they did not give full Evidence.

There needs 2
Witnesses for
Treason, at
this Day.
Stat. 1 & 2 P.
& M. Cap. 10.
See afterwards
in this Book,
fo. 49, more of
this Point.
Same Witnesses
to find the In-
dictment, and
at Tryal.
3 Inst. 25 & 26.

Confession upon
Examination
proved by two
Witnesses good
Evidence of
itself.
Na. ore 7 W.

4. Altho' the Lord Chief Justice *Bridgeman*, and some others of the Judges were of Opinion that those Words of two Witnesses in case of High-Treason, were repealed by the *Stat. 1 & 2 P. b. & M. Cap. 10.* which enacts that all Tryals for Treason be according to the Course of the Common Law: And at Common Law, one Witness is sufficient to a Jury, tho' *Co. Pl. Cor.* is against this Opinion, yet they all agreed that if that Law for two Witnesses be in force, yet the same two Witnesses who are to the Indictment, may be also the Witnesses at the Tryal: And the Law doth not require two to the finding the Indictment, and two others at the Tryal.

5. They all agreed that if a Conspirator be examined before a Privy Councillor or a Justice of Peace, and upon his Examination without Torture confess the Treason; If after at his Tryal he deny it, and two Witnesses to prove that Confession, are good

¹ The Judges who dissented were Lord Hale and Mr. J. Brown; and Lord Hale is of the same Opinion in 2 H. P. C. 280: But the Opinion of the Majority of the Judges has been ruled to be Law, in *Layser's Case*, 6 St. Tr. 259, as well as in the present Case; yet for the Reasons in 1 H. P. C. 304, it is a great Objection to the Credibility if not to the Competence of the Witness.

good Evidence against him that made that Confession, at his Examination aforesaid; and in that case there needs no Witnesses to prove him guilty of the Treason; for that Confession puts it out of the Statute which requires two Witnesses to prove the Treason, unless the Party shall without Torture confess the same; and the Confession there spoken of, is not meant a Confession before the Judges at his Tryal, but a Confession upon his Examination; But such Confession so proved is only Evidence against the Party himself who made the Confession, but cannot be made use of as Evidence against any others whom on his Examination he confessed to be in the Treason.

3: dit.
Confession in
open Court.
Sic quare si
confession ut icy
sufficient vide
by Layer's
Trial, 1722.
6 St. Tr. 276.
2 Hawk. 353,
596.
2 H. P. C. 286.
Fost. 240.

- [19] 6. They all agreed that such a Confession upon Examination before a Privy Councillor, tho' he be not a Justice of Peace, is a Confession within the meaning of the Statute; and the rather as the Lord *Bridgeman* said, because Justices of the Peace were not enabled to take Examination before the *Stat. 1 & 2 P. & M. Cap. 13*.

Confession be-
fore a Privy
Councillor is a
Confession
within the
Statute.

Memorandum, That a Week before *Christmas*, 15 *Car. 2*. my Brother *Turner*, myself, and my Brother *Archer*, were appointed by the King to go to *York*, for the Tryal of several Persons there taken for conspiring to levy War against the King, and some of them did actually meet in *Farmleigh-wood* near unto *Leeds*, with Horses, Arms, and Foot Soldiers. And thereupon there was a meeting by the two Chief Justices, my Lord *Hyde*, and my Lord *Bridgeman*; and we three with Sir *Jeff. Palmer* the King's Attorney, and Sir *Heneage Finch* the King's Solicitor, did thereupon debate several Things which were agreed by us all, viz.

The North
rising, 15. Car.
2.

1. That if several Persons do agree to levy War, and some of them do actually appear in Arms, and others

Several Persons
agree to raise
War, and some
others

appear actually
in Arms.

1 H. P. C. 133.

3 Inst. 9, 10.

others do not, this is an actual levying of War in all of them, as well those who were not in Arms, as those who were, if they be proved to be of the Plot with them who did actually appear in Arms; for there are no Accessaries in Treason, and therefore all that are in the Conspiracy are equally guilty.

1 Hawk. 12.

In the next place, we being informed that tho' there was a Conspiracy to raise War in the *North Riding of Yorkshire*, as well as the *West Riding* where some did actually appear in Arms, yet it could not be proved that those in the *North Riding*, did agree to the rising that was in the *West Riding*, or that they knew anything of it, and so would not be within the first Resolution.

New Statute
for Safety of
the King's
Person.

And thereupon the new Statute made the 13 *Car.* 2. for the safety of the King's Person, which maketh the Conspiracy compassing and intending to raise War to be High-Treason, in case they express or declare such Imaginations, Intentions, &c. by Printing, Writing, Preaching, or malicious, and advised speaking; and upon that Act it was agreed, [20]

*This Act expired on the
Death of Car. 2.
Foll. 220.*

*A similar Act
had passed in 13
Elix. and ex-
pired at her
Death.*

1 Hawk. 8, 9,
12, 13.

Foll. 220.

2. That if one be indicted for imagining or intending to levy War, there must be some Overt Act laid in the Indictment to prove such Imagination, as there is at this Day in Indictments for compassing and imagining the King's Death; and it was conceived that no Overt Act could be laid to make it Treason within that Statute, but one of those which are named in that Statute, viz. Printing, Writing, Preaching, or Malitious, and advised speaking, and we were informed that no Printing, Writing, or Preaching could be proved, and it would be impossible to lay such Words as could be fastened on them, and to prove that they spoke them; but in general we were informed, that their consulting and meeting

meeting together, and agreeing to raise War would be proved; and thereupon it was resolved that the best and safest way to proceed against them, was to indict them for compassing and imagining the Death of the King, and to lay the meeting, consulting, and agreeing to levy War, as one Overt Act, and the actual levying War as another Overt Act, and so proceed upon the *Stat. 25 Ed. 3.*

3. For it was resolved, and agreed by all now as it was before in *Tong's Case*, and *Sir H. Vane's Case*, that the meeting and consulting to levy War is an Overt Act to prove the compassing the King's Death within the *Stat. of 25 Ed. 3.* Altho' the consulting to levy War is not actual levying within the Statute, and so cannot be indicted thereupon, for that Treason of levying War. Yet if they be indicted for the Treason of compassing and imagining the King's Death, that consulting to levy War is an Overt Act to prove that Treason, altho' *Co. Pl. Cor. 14.* delivers an Opinion against this.

Consulting to levy War is an Overt Act to prove compassing the King's Death.
2 St. Tr. 478.
2 St. Tr. 435.

[21] 4. It was resolved, that if Persons do actually levy War, so that they may be indicted for the Treason of levying of War, within the *Stat. 25 Ed. 3.* yet they may be indicted for compassing the King's Death, and their actual levying of War may be laid as an Overt Act to prove the compassing the King's Death: And tho' *Co. Pl. Cor. 14.* be of another Opinion, yet that is no Law: For he expressly contradicts himself, for he reports the Case of the Lord *Cobham*, 1 *Jacobi 1.*

Actual War an Overt Act to prove the compassing the King's Death.
Dyer 308.
Pl. 73.
1 H. P. C. 127
(18)

And the Case of the Earl of *Essex*, 43 *Elix.* where it was resolved by all the Judges, That the gathering of Men together to compel the King to yield to certain Demands, or to remove ill Counsellors, was an Overt Act to prove the compassing of

1 St. Tr. 197.

Errors in *Co. Pl.*
cor' Jurisdiction
of Courts, of
Treason, and of
Parliaments.

Misprision of
Treason; what,
and what not.
Ante 17.
1 Hawk. 60.
4 Black. Com.
120.

What requisite
to make Mis-
prision of
Treason.

1 Hawk. 61.

Misprision
what is a dis-
covery, and

the King's Death, for which they were indicted, so *Co. Pl. Cor.* 12. accords, and in the same Book, *fo.* 14, &c. agreeth, That if a Subject conspire with a Foreign Prince beyond Seas to invade the Realm, and prepare for the same by some Overt Act, this is a sufficient Overt Act to prove him guilty of Treason in compassing the King's Death. And it was observed that in these Posthumous Works of Sir *E. Coke*, of the Pleas of the Crown, and Jurisdiction of Courts, many great Errors were published, and in particular in his discourse of Treason, and in the Treatise of Parliaments.

5. It was agreed that the bare knowledge of Treason, and the concealment of it was not High-Treason, but Misprision of Treason. But in Case any thing be proved upon Evidence, that the Party liked or approved of it, then it is High-Treason; or if the Party knew of the Design, and after such Knowledge, met with the Conspirators at their Consultation; or if he went knowingly to their Consultations several Times, this is Evidence of his Approbation of the Design, and is High-Treason.

6. It was agreed that to make a Misprision of Treason, there must be a Knowledge of the Design, and of the Persons, or some of them; for a Man cannot be said to conceal what he doth not know; and therefore, if one tell *I. S.* in general, that there will be a rising without acquainting him with the Persons who are to rise, or with the Nature of the Plot, If *I. S.* conceal this, this is no Misprision of Treason, because he hath no Knowledge of the Treason. [22]

7. It was agreed that if one knew of a Treason and knew some of the Conspirators, and then tel other Men in general Terms that there will be a rising,

rising, &c. without a discovery of the Plot, or the Traitors, such a Discourse will not acquit him from Misprision of Treason by concealment of it, because notwithstanding those general Discourses, both the Treason and the Traitors are concealed by him.

what not.
1 Hawk. 61.

8. And in case such a Person who knoweth of a Treason, and the Traitors, and discovers all he knoweth to another Person who is not a Privy Counsellor, or a Justice of Peace, or hath Authority to take Examinations concerning it, it was doubted whether such a discovery would acquit him from concealing of Treason which is Misprision.

What shall be
a discovery of
Treason.

At the Sessions in the *Old Baily*, 20 Feb. 15 Car. 2. *John Twyn* was indicted on the *Stat. 25 Ed. 3.* of High-Treason, for compassing and imagining the King's Death, and the Overt Act laid in the Indictment was, the Printing of a Seditious, Poisonous and Scandalous Book, entituled, *A Treatise of the Execution of Justice, wherein is clearly proved that the Execution of Judgment and Justice is as well the Peoples as the Magistrates Duty, and if the Magistrates pervert Judgment, the People are bound by the Law of God to execute Judgment without them, and upon them.* And besides that Title of the Book, several Passages in the Book were set forth in the Indictment, which in substance were, first, That the supreme Magistrate is accountable to the People. 2. The People are incited to take the Management of the Government into their own Hands. 3. The People are encouraged to take up Arms against the King and his Family. 4. They are stirred up to revolt, as an Action honourable and conscientious, and Encouragements given to any Town, City or County in the three Kingdoms to begin the Work. 5. The People are exhorted, not only to cast off their

Twyn's Case.
2 St. T. 528.
8 St. T. 380.
1 Hawk. 13,
18.
Printing Treasonable Positions, an Overt Act to make good an Indictment, for compassing the King's Death.

[23]

their Allegiance, but to put the King to Death. And upon the Evidence it was proved, that *Twyn* being a Printer, by himself and Servants printed this Book; That he corrected some of the Sheets, and that he scattered many of them to be sold; and he was found guilty, and had Judgment for High-Treason, and was accordingly executed.

At this Tryal were present of the Judges the Chief Justice *Hyde*, and myself, and also my brother *Wyld* Recorder of *London*, and resolved by all clearly, That Printing and Publishing such wicked Positions, was an Overt Act declaring the Treason of compassing and imagining the King's Death, which was also agreed by the Rest of the Judges upon our Discourse with them. At the same Sessions *Simon Dover*, *Tho. Brewster*, and *Nathan Brookes*, Printers and Booksellers, were indicted at the Common Law, as for a great Misdemeanour for printing and publishing one Book, called, *The Speeches and Prayers of Harrison, Cook, Hugh Peters*, and others condemned for the Murder of the late King, in which were many desperate Passages, justifying their Villainy; and another Book called, *The Phoenix, or Solemn League and Covenant*; In which also were Passages of dangerous Consequence. And they being found guilty, it was resolved, That tho' Printing be a Trade, and selling of Books also, yet they must use their Trade according to Law, and not abuse it, by printing or selling of Books scandalous to the Government, or tending to Sedition. So in case of a Councillor at Law, he may plead his Clyent's Cause against the King; but if, under Colour of that, he takes upon him to vent Sedition, he is to be punished.

*Brewster and
Brooke's Case.*
2 St. Tr. 528,
538, 545.

Judgment.
2 St. Tr. 357.

*Memorandum. Cooke's Case, a Lawyer in Gray's-
Inn,*

[24] *Inn*, who managed that villainous Charge against the late King at his Tryal, would have excused himself, because he acted only as Counsellor; but that would not serve his turn; he was executed with the Rest. And in this principal Case the Persons were told, that the King had dealt Mercifully with them, that he did not proceed against them capitally, and they were all fined, viz. *Brewster* 100 Marks, and *Dover* and *Brookes* 40 Marks apiece, and every of them to stand in the Pillory, one Day at the Exchange, from Eleven to One, and another Day in *Smithfield*, for the same Time, with Papers on their Hats, declaring their Offence for printing and publishing scandalous, treasonable, and factious Books against the King and Government, and to lie in Goal without Bail till the next Goal Delivery, and then to make an open Confession and Acknowledgment of their Offences in such Words as should then be Directed; and afterwards to remain in Prison during the King's Pleasure, and not to be discharged before every one of them put in good Sureties by Recognizance, themselves in 400*l.* apiece, and two Sureties for each of them in 200*l.* apiece, not to Print or Publish any Books but such as shall be allowed by Authority.

Judgment
against *Brewster*
and others.

Newgate Sessions, 14 October, 14 Car. 2.

Mary Raven, alias Aston, was indicted for stealing two Blankets, three pair of Sheets, three Pillow-biers, and other Goods of *William Cannon*. And upon the Evidence it appeared, that she had hired Lodgings and Furniture with them for three Months, and during that Time, conveyed away the Goods which she had hired with her Lodgings, and she herself

Raven's Case.
1 Hawk. 142,
146, 153.
If one hireth
Lodgings and
Furniture, and
taketh away
ye Goods, no
Felony.

30 *Murder and other Offences.*

Co. Pl. Cor.
107, 108.

1 Hale 504.

2 Hawk. 537,
549.
Indictment for
Murder hath a
Pardon which
extends to Mur-
der, pleads 5
culp. & found
guilty of Man-
slaughter, and
that obtains
his pardon, re-
fused to allow
it: authorize
Ye Pardon ex-
tends to Man-
slaughter only.
March 213.
Styles 369.
2 Hawk. 537,
549.
Wilson 150.
2 Hale 256.
1 Hale 467.
S. P. C. 173,
169.
B. Cor. 200.

herself ran away at the same Time.¹ And it was agreed by my Lord *Bridgeman*, myself, and my Brother *Wylde*, Recorder of *London*, then present, that this was no Felony, because she had a special Property in them by her Contract, and so there could be no Trespass; and there can be no Felony where there is no Trespass, as it was resolved in the Case of *Holmes*, who set fire on his own House in *London*, which was quenched before it went further. *Vide* the End of this Book, *Kelyng contra* 81. 82.

At the same Sessions one was indicted for Murder, and upon his Tryal was found guilty of Man-slaughter, and then offered to plead the King's Pardon, which upon sight of it *pardon' feloniam & feloniam interfeccon'* of the Man slain, *Non obstant'* the Stat. of 10 E. 3. Stat. 1. c. 2. & 13 R. 2. Stat. 2. Cap. 1. which [25] was agreed by us all to be a Pardon of Murder, notwithstanding the Proceedings in *Rickabee's* Case by *Rolls* during the late Troubles, and then the Question was, if now the Party had not lost the Benefit of his Pardon; for he that pleads a Pardon confesseth the Fact, and relyeth upon the King's Mercy: And therefore, if after his Pardon, he plead not guilty, he waveth his Pardon, which is clear Law.² But here the Question was, because this Pardon here by the express Words pardons Man-slaughter only, and then by reason of the *non obstant'* it extends to pardon Murder, whether tho' he waved it as to Murder, he might not make use of it as to Man-slaughter. And

¹ Altered by Stat 3. W. & M. Cap. 9. s. 5. *Vide* Postea 81. Denied to be Law, and found Felony.

² But see the King and Haines, Wilk. 214, where the Benefit of an Act of Grace was allowed after the general Issue pleaded.

And as to that, there being some difference in Opinion, the Party was bailed, and had a Certificate from us of the Nature of the Case, and thereupon obtained a new Pardon. But it was agreed by us all, if the Pardon had not extended to pardon Murder, he could not possibly make use of it. And therefore, upon this Tryal, he was only found guilty of Man-slaughter, he might plead that Pardon, and it should have been allowed: And after, when he came to plead his new Pardon, and that was allowed, he paid Gloves to the Judges, which is a due Fee for that, *Vide 4 E. 4. 10 B. Pulton de pace 88a.*¹

Gloves due to Judges on allowance of Pardons. 2 Hawk. 552.

Memorandum, In the aforesaid Case it was moved, that the Court should not absolutely discharge the Person, but ought to commit him or bayl him, until the Year and a Day after the Fact committed, by the Statute of 3 H. 7. C. 1. S. 3. But upon sight of that Statute it appeared that that Statute extends only where Persons are indicted for Murder, and are acquitted, there they are to be committed or bailed till the Year and a Day past, that if any one will bring an Appeal, he may be forth-coming: But extends not to Persons who being indicted for Murder are found guilty of Man-slaughter, or *se defendendo*, or by mischance.

Stat. 3 H. 7, cap. 1, sec. 3, for committing or bailing extends only to such as are acquitted for Murder, and to such as are found guilty of Manslaughter.

At the same Sessions, one *John Roberts* was indicted as a Principal in a Burglary, and upon the Evidence it appeared, that he was only accessary after the [26] Fact, by receiving those who did it, and the Goods, and thereupon it was doubted, that if the Jury should acquit him, as they must upon this Indictment, whether he might afterwards be indicted as Accessary.

One acquitted of the principal Fact cannot after be arraigned as Accessary before the Fact, but he may be arraigned again as Accessary after the Fact.

¹ In some editions page 90.

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Accessary before
or after, Diver-
sity as to ac-
quittal on In-
dictment as
Principal.
2 Hawk. 522.
3. P. C. 44,
105.
Sum. 224, 244-
1 Hale 626.
Foster 362.
Post. 30, 47, 52.
Fost. 30, contra.
See the Case of
Samuel Atkins.
2 St. Tr. 791.

Accessary. And therefore to avoid all doubt, the Court discharged the Jury of him, and ordered another Indictment to be against him as Accessary. But afterwards, upon Consideration of the Books, we did agree, that the Law was, If one was indicted as Principal and acquitted, he cannot after be indicted as Accessary before the Fact: But notwithstanding such Acquittal, he may be indicted as accessary after the Fact, and the Reason is, because he that commands or advises a Robbery, Burglary, or Murder to be committed is *quodam modo* guilty of the Fact; And therefore if he be found not guilty of the Fact, being indicted as Principal, he cannot afterwards be tried as Accessary before the Fact, because by the former Verdict, he is found not to be guilty of the Fact, which extends to all guilt before the principal Fact committed. But an Accessary after is not guilty in any sort of committing the Fact, for it was done before he knew any thing of it; therefore if he be tried as Principal, and found not guilty, he may be after indicted as Accessary after; for that is an Offence subsequent to the committing of the Fact, and is for receiving the Felons, or after the Fact done, which is an Offence of another Nature: So are the Books, 27 *Aff. Pl.* 10. 8. *H.* 5, 6, 7. And so have the Presidents upon Examination always been at *Newgate Sessions*.

Rew's Case.
Disorder or
neglect not ex-
cuse the Person
who gave the
Wounds.
1 Hawk. 93.
1 Hale 428.

At the same Sessions, *Edward Rew* was indicted for killing *Nathaniel Rew* his Brother, and upon the Evidence, it was resolved, that if one gives Wounds to another, who neglects the Cure of them, or is disorderly, and doth not keep that Rule which a Person wounded should do; yet if he die it is Murder or Man-slaughter, according as the Case is in the Person who gave the Wounds, because if the Wounds

Wounds had not been, the Man had not died ; and therefore neglect or disorder in the Person who received the Wounds, shall not excuse the Person who gave them.

[27] At the same Sessions, *Thomas Middleton*, Tooth-drawer on *Ludgate-hill*, was indicted for marrying two Wives, and upon his Tryal, he produced a Sentence of Divorce from his first Wife under Seal *Causa Adulterii*, of her Part, and agreed that he was not within that Statute, for *Rooke's Case* was stronger, which see,¹ 1 Cro. 461. where the Divorce was *causa sevitia*, and that adjudged to excuse from the Statute.

At the same Sessions, one *Henry Burgefs* was indicted for breaking up a Chamber in *Somerset-house*, and the Indictment layd it to be *dom' Manconal'* of the Person who lodged in it. And it was agreed, that the Indictment was not good, because all *Somerset-house* is one intire House of the *Queen-mother*, and all who Lodge in it are her Servants ; and therefore it ought to be *dom' Manconal'* of the *Queen-mother*. So for *White-hall*, which is the King's House ; and it differs from the Case of an Inns of Court, where every Gentleman hath a several interest, and therefore there every several Chamber is *domus Manconal'* of the Person who hath the Interest.

Also 495. 2 Hale 357. Sum. 237, 8. *Lee v. Ganfel Cropper* 1.

At the same Sessions, one *John Legg*, being indicted for the Murder of Mr. *Robert Wise*. It was upon the Evidence agreed, that if one Man kill another, and no sudden Quarrel appeareth, this is Murder, as Co. 9. Rep. fol. 67. b. *Makelly's Case*.

And

Middleton's Case.
Two Wives and
Party Divorced
causa Adulterij
not within Stat.
21 Jacob. Sed
Vide Duche's of
Kingslon's Case.
11 St. Tr. 198.
1 Hawk. 686.
1 H. P. C. 694.

Burgefs's Case.
Chamber in
Somerset-house,
not the Man-
sion-House of
him who
abideth in it ;
otherwise of a
Chamber in
Inns of Court.
1 Hawk. 133,
210.
See Fost. 39.
1 H. P. C. 522,
557.
2 Hawk. cap. 35
on Indictments.
2 Salk. 532.

Legg's Case.
Murder to kill
one without
Cause, the sud-
dain Quarrel
lyeth in the
Prisoner to
prove.

¹ Cro. Car. 461.

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¹ Hawk. 93.
Fost. 255.

Quarrel in
Morning, Fight
in Afternoon,
Murder.

³ Inst. 51.
¹ Hawk. 96.
Fost. 297.

Thorley's Case.
One stand Mute,
Thumbs tyed
together with
Whipcord.
² H. P. C. 319.
² Hawk. 464.

Stand mute or
challenge
peremptorily.
clergy allow-
able in cases.

Where an In-
dictment shall
conclude *contra*
formam Statuti
and where not.

And it lyeth upon the Party indicted to prove the suddain Quarrel.

And in this Case it was also agreed, that if two Men fall out in the Morning, and meet and Fight in the Afternoon, and one of them is slain, this is Murder, for there was time to allay the Heat, and their after-meeting is of Malice.

At the same Sessions, *George Thorley*, being indicted for Robbery, refused to plead, and his two Thumbs were tyed together with Whipcord, that the Pain of that might compel him to plead, and he was sent away so tyed, and a Minister perswaded to go to him to perswade him; And an Hour after he was brought again and pleaded. And this was said to be the constant Practice at *Newgate*.¹

[28]

Memorandum, If one be indicted for such a Felony for which Clergy is allowable, if he were found guilty by verdict in such case if the party stand mute or refuse to plead or challenge peremptorily above the number allowed by Law, yett Clergy ought to be allowed him, but if the crime be such that Clergy is not allowable if they had been found guilty by verdict in such case, they stand mute, &c., no Clergy is allowable. All this appears by the Statute 25 H. 8. C. 3.

Memorandum, Where a felony is at Common Law and Clergy is taken away by a Statute, there the Indictment is not to conclude *contra formam Statuti* but generally *contra pacem Domini Regis coronam et dignitatem ejus*, but the speciall matter is to be laid in the Indictment and by the Judges took notice that the party ought not to be allowed Clergy

as

¹ This Practice is rendered unnecessary by 12 Geo. 3. C. 20.

Murder and other Offences. 35

as upon the Statute 23. *H. 8. C. 1.* for robbing any house in the day time when the owner, his wife, children, or servants are therein and set in fear, and Statute 39 *Eliz. C. 15.* for robbing any house in the day time nobody being in the house and taking any goods of the value of 5*l.* or upwards, so in *Stat. 1. Jac. C. 8.* so killing a man not having a weapon drawne, or having first struck, &c., in all these and the like the circumstances which take away Clergy are to be expressed and then conclude *contra pacem*, &c., without saying *contra formam Statuti*, for the offence is felony at Common Law, but if a Statute make a felony which was not at Common Law, there the Indictment must conclude *contra formam Statuti*, &c.

Memorandum, By *Stat. 5 Ed. 6. C. 9.* if a man be indicted for robbing a house in the day time some person being then therein, Clergy is taken away though that person is not putt in fear or dread, and the Indictment may be so drawn and the party shall not by that Statute have his Clergy for that Statute doth not require those circumstances of fear or dread as the *Stat. 23 H. 8. C. 1.* doth, but if a man break house in the day time in one County and carry the goods into another County and be indicted there according to the *Stat. 5 Ed. 6.* there he shall have his Clergy which he should not have if he were indicted according to the *Stat. 25 H. 8. C. 3.* and the reason is because the *Stat. 25 H. 8. C. 3.* which provideth that where persons after robberys and burglaries committed carry the goods stolen into another County and are there indicted, that in all such cases if it appear in evidence or examination that if they had been indicted in the County where the burglaries or robberys were committed they should have

Robbing a house in the day time, a person being in it though not putt in fear by Statute 5 *E. 6* Clergy taken away.
Co. Pl. Cor. 114.

Robbery, Burglary, or breaking house in one County and goods carried and there tried in another County.

Where Clergy taken away and where not.

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have lost benefitt of Clergy, there they shall also not have benefitt of Clergy in the County where they are taken, and have carried the goods, and the *Stat. 25 H. 8.* extends only to such cases where Clergy is taken away by *Stat. of 23 H. 8*; but if Clergy be taken away by any subsequent Statute then the *Stat. 25 H. 8.* doth not extend to it, so that if one break a house and thereby putt in fear or dread and this appear on the evidence or by examination of the Judge the felon hath lost his Clergy as well as if he had been tryed in the County where the house was broken, and in that case if he were indicted in the other County to which he carryed the goods according to the *Stat. of 5 E. 6. Cap. 9.* [some one] being in the house (and [county and house and] the circumstances of being putt in fear and dread [being considered]) Clergy is to be allowed him, although in this case he should not have had Clergy if he had been tryed on this Indictment in the same County where he break the house, *Co. Pl. Cor. 11.*

Burglary.
Clergymen &
others in same
degree.

Memorandum, By the *Stat. of 23 H. 8. C. 1.* which taketh away Clergy for severall offences persons in holy orders are excepted, but by the *Stat. 28 H. 8. C. 1.* and *Stat. 32 H. 8. C. 3.* they are in the same degree as to Clergy and burning in the hand as other men.

1 E. 6. of re-
storing Clergy
repealed & 25
H. 8. restored.

Memorandum, Whereas by a Clause in the *Stat. 1 Ed. 6. C. 12. Sect. 10.* there is a Clause that in all cases of felony (but such as there are mentioned and from which Clergy is taken away) the benefitt of Clergy shall be allowed, and thereby divers felons which by the *Stat. 25 H. 8. C. 3.* were ousted of Clergy are restored to Clergy again but the clause of the *Stat. 1. Ed. 6.* is repealed by *Stat. 5 Ed. 6. C. 10.* and *Stat. 25 H. 8.* thereby revived. By the *Stat. 5 H. 4.*

Murder and other Offences. 37

H. 4. C. 10. Justices of Peace are only to commit to the Common Gaole, saving to [Lords and others] their Franchises who have Gaoles, and therefore they offend when they commit to Compters in *London* and other prisons which are not Common Gaoles, *Vide Co. 9. 119.* Lord *Sanchar's* Case, *vide Stat. 23 H. 8. C. 2.* expresse that all felons be committed to the Common Gaole, *vide Stat. 19 H. 7. C. 10.* fines upon Gaolers for negligent escapes of prisoners appointed not to be under certain sums there sett downe according to the nature of their crimes.

At the Sessions at *Newgate*, 9th Dec. 15 *Car. 2.* my Lord *Bridgeman* my selfe and brother *Wylde*, Recorder of *London*, present, one *Philip Wilson* was indicted for venting & dispersing and uttering false mony, and it was agreed that if one actually coin false coin or mony, or if he know them who doe coin and he utter it, in both these cases all are guilty of high treason as coiners of false mony, for there can be no accessarys in treason, but if one utter false mony knowing it to be false but does not know the persons who coined it, in that case he is no expresse aider to the coiner and therefore that is no Treason, but a great misprision for which he is fineable, but it is not misprision of treason, for nothing is misprision of Treason, but knowing the person and concealing it as is declared by the *Stat. 5 & 6 Ed. 6. C. 11. vide* as to this matter 3 *H. 7. 10. and Stamford's Pl. Cor. 37, 38. Co. Pl. Cor. 24, 36. Dyer 296. Sir John Conyers Case.*

At the same Sessions *Charles Sands* indicted for Felony, and upon the evidence the case was that he entred the house of *Thomas Wetherway*, the doors being open and had taken two coats, &c., and brought them from the room to another, but before

11 Co. Rep. 30, 31.
Alexander Powlter's Case.

Imprisonment
Per J. P.: in common
Gaoles.
Escapes per
Gaolers *vide*
Statutes.

False mony
uttering, knowing the Coiner,
treason.
Taking it, and knowing it
false, uttering it,
no treason but
crime fineable.

Felony removes
[goods] from
one place to
another though
not taken away
if thief there
taken.

before he could carry them away company came and took him, it was agreed that it was felony although he had not carryed them out of the house, by removing them from the place where owner had laid them, the thief had taken the possession of them, and so he did feloniously take them and conveyed away from the place where the owner left them, *vide 27 Afs. Pl. 39.*

Witnesse one
prisoner against
another.

At the same Sessions one *Henry Trew* was taken for Burglary or breaking the house of *William Rutts*, and one *Thomas Perry* a prisoner in *Newgate* was sworn as a witnesse to give evidence against *Trew*; the said *Perry* being one of them who was with *Trew* and joined with him in the Burglary, but was not indicted for that Burglary, but was indicted for another Burglary, but he was called as a witnesse before he was arraigned for that Burglary whereof he himself was indicted.

On 1 Jac. 8. of
Stabbing.
Clergy taken
from him who
actually give
the wound and
not from the
rest present
ayding.

At the same Sessions upon the indictment of *Daniel Gleach* and *Nicholas Cambridge* for killing a man, it was agreed that if severall men come in aid one of another, and one only give the wound, all of them are in equal degree, and it is in law the stroke of every one of them, as *Plowden Com. 98*, but upon the *Stat. 1 Jac. 8.* if severall men be indicted for killing a man having not first stricken nor having any weapon drawn, and it appeareth on evidence that one of them only struck the stroke, and the rest were ayding to him, there though all be guilty of manslaughter yett all of them shall have Clergy except him only who gave the stroke because the words of the Statute are if any person shall stab or thrust through any person not having a weapon drawn, or having first struck, of which the party shall dye within 6 months altho' no malice forethought can be proved, yett the person so offending shall loose the benefitt of his Clergy,
so

so that, that Statute taking away Clergy only from him who actually struck the stroke, and not from those who gave the stroke by construction of law, and so it was then said it was resolved by the Judges in the case of one *Walsh*, 15 Car. 1.

Walsh's Case.

And upon this occasion was remembered the case of Sir *John Digby* which was this, Sir *John Sucklin* was suitor to a young Gentlewoman, and conceiving Sir *John Digby* to be his rivall and hinder his designe he gott another man to assist, and they both watched Sir *John Digby* as he came out of the Playhouse in Black Fryers and there sett upon him in the lane, and Sir *John Digby* drew his sword and killed him who came to aid Sir *John Sucklin*, and it was resolved that this was no felony in Sir *John Digby* for by the Statute 24 H. 8. C. 5. it is declared that if any man attempt to rob or murder any person in or nigh any highway or footway or in their mansion house, or attempt to break any house in the night and be slayn, that the person indicted for killing any such person so attempting and the same being found by verdict shall forfeit nothing but be discharged in like sort as if he had been acquitted, and upon this Statute was Sir *John Digby* acquitted and adjudged no felony, but it was agreed that if Sir *John Digby* had been slayn it had been murder in Sir *John Sucklin* and his companion.

Sir John Digby.

Killing one who attempts to rob in or near highway or in Mansion house in day or burglary in night, I conceive the Statute extended to attempt to rob or kill a man in his house in day or night.

Note, That though it seem that upon this Statute the speciall matter is to be found by the Jury, yett *Co. Pl. Cor.* 220 saith that if the circumstances required by the Statute are proved to the Jury upon evidence, they may find a generall verdict of not guilty.

Memorandum, That in *Hilary Term* 13 Car. 1. *Justice Crook* gave the charge in the *King's Bench* to the

Killing for wry mouth making

40 *Murder and other Offences.*

or scoffe, murder.

the grand Jury, and there speaking of murder he said that if a man take offence at one other for making a wry mouth att him or giving him a scoffe, and thereupon without any other cause kill, this is murder, for so light a cause in law is counted no cause and so had been adjudged.

What Circumstances inquirable where one kills another in keeping the Peace, or where a Parent or Master kills a Child or Servant in chastizing.

1 Hawk. 85.
2 Roll. 120.
Sum. 38.
1 Hale 473.
Fost. 262.

Clergy, the Court Judge of reading, not the Ordinary.

2 Hawk. 470.
et seq. 302, 501.

In the Absence of the Ordinary the Court may deliver the Book *F. N. B.* 66, b. accordingly the Court delivered the Book in absence of the Ordinary.

Note, That although if an Officer or other Person kill another in preserving the Peace, or a Parent, Master, or Schoolmaster kills his Child, Servant or Scholar in chastizing or correcting him, this shall be said to be *per Infortunium*, yet *Vide Stat. 1 Jac. Cap. 8*, for stabbing, there at the End of it, there is a *proviso*, that the Statute shall not extend to any Person who shall kill in keeping and preserving the Peace, so as the Man-slaughter be not committed wilfully and of purpose, under pretext of keeping the Peace; nor to a Master or Parent in chastizing his Child or Servant, besides his or their Intent or Purpose, so that those Circumstances are inquirable in those Cases.

Vide 9 E. 4. 28. One demands his Clergy, and the Court took the Book and turned him to a Verse, and he could not read well, but read one Word in one Place and another Word in another Place. And the Judges asked the *Ordinary* if he would have him; and he answered yea. The Judges bid him consider, and told him the Court was Judge of his reading, and if the Court should Judge he did not read, the *Ordinary* should be fined, and the Prisoner hanged, notwithstanding his demanding of him, and he was hanged, *vide Fitz Abridgment, titulo Corone 32.* And *vide* at the End of the Case in the Book at Large, *viz. 9 E. 4. 28.* several Books are cited where, in the Absence of the *Ordinary*, the Court delivered the Book to the Prisoner, *vide* the same Book.

A Man

A Man who had abjured the Realm for the Death of a Man, was brought to the Bar, and being demanded what he could say, why Execution should not be awarded. He pleaded the King's Pardon, which was disallowed, because there was no mention in it, that he had abjured; and after he prayed his Clergy, which was disallowed *ut supra*; and after he pleaded, he was taken out of a *Sanctuary*, and desired to be restored, which the Court refused, and said he should not have that Plea, because being asked what he could say, why Judgment and Execution [29] should not be given and awarded against him, he had pleaded his Pardon, and that being disallowed, he should not be received to plead any other Plea, which was ruled accordingly, for he was hanged. So *Note*, Tho' a Prisoner in such a Case, must at his Peril plead such a Plea as he will stand to, for it is peremptory to him if the matter, &c. pleaded be judged against him; yet after such Plea, he may and ought to have the Benefit of his Clergy.

At the Sessions for *Newgate*, 20 April 1664. 16
Car. 2. The Chief Justice *Hyde*, myself and my brother *Wylde* present, One *John Joyner* was indicted for stealing a Copper, and upon the Evidence it appeared the Copper was fixed to the Freehold, and he broke it up and carried it away; And thereupon the Jury was directed by the Court, that he was not guilty, because it was no Felony. But my Lord Chief Justice *Hyde* said, that it being so rank a Trespass the Jury might find it Specially, that he did take up the Copper, but that it was fixt, and so leave it to the Court, to judge whether Felony or no, and thereupon the Court judge it Trespass, and fine him, and give him other Punishment fit for such a Trespass, as the Court did in *Holmes's Case*, *Cro. Car. 376*,

G

377.

2 Hale 381.
 Pardon void,
 because the
 King did not
 take notice
 the Party had
 abjured.
 2 Hawk. 534.

When a Prisoner is demanded what he can say, why Judgment should not be given, His first Plea is peremptory if that be over-ruled, yet Clergy allowed in that Case after Plea judged against him.

Joyner's Case.

Whereupon an Indictment for Felony the Court may give Judgment for Trespass.

1 Jones 351.
 1 Hawk. 139.

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Foft. 115.
1 Hale 568.

377. But my Brother *Wylde* and I differed in that Point, and said it was not like *Holmes's Case*; For there all the special Matter was expressed in the Indictment, viz. That *Holmes* being possessed of a House in *London*, did *Felonice* set on Fire his own House and burn it with intent to burn the Houses of other Men near adjoining, and of this the Jury found him guilty, and before Judgment, because the Court doubted whether it was Felony or no, the Record was removed into the *King's-Bench*, and the Advice of all the Judges taken, and agreed, that it was no Felony: And thereupon all the special Matter being in the Indictment, and he found guilty of that as it was laid, in Law it being no Felony, he was found guilty of the Trespass, for which the Court gave Judgment against him. But in this Case he is indicted generally for stealing a Copper, which may not be fixt, and if the Jury should find him guilty generally, the Court must give Judgment as for Felony. For the special Matter that it was fixt is not laid in the Indictment. And it would be dishonourable for the Court in so plain a Case as this, to suffer the Jury to find a special Verdict, so all agreed that the Jury should find him not guilty, which was done accordingly, *Vide* 2 H. 7. 10, b. [30]
Though Felony includes Trespass, yet if the Party indicted be discharged of the Felony, which is Principal, he is thereby acquitted of the Trespass, *tamen Quere* of this, and *Vide* the Book.

1 Hale 510.
2 Hawk. 621.
3 Cro. 332,
Martin Page's
Case, sic ad
contra.

Locost and *Villars's* Case.
Burglary to
break an House
in the Night
with an intent
to commit

At the same Sessions *John Locost* and *Lawrence Villars* were indicted for Burglary for breaking and entering a Man's House with an intent to Ravish his Wife, and were found guilty, and had Judgment to be hanged. Upon the Evidence, the Fact was very foul, for the Woman was actually ravished by one,

one, and afterwards they thrust a Torch betwixt her Legs, &c.

Felony.
1 Hawk. 136.

At the same Sessions there was this Question, One *James Turner* and *William Turner*, at *Christmas* Sessions last, were indicted of Burglary for breaking the House of Mr. *Tryon* in the Night, and taking away great Sums of Money: and thereupon *James Turner* was found guilty and executed; but *William Turner* was then acquitted. And now there being great Evidence that *William Turner* was in the same Burglary with *James Turner*, and there being 47*l.* of the Money of one *Hill*, a Servant to Mr. *Tryon*, stolen at the same Time, which 47*l.* was not in the former Indictment, they would have indicted *William Turner* again now for Burglary, for breaking the House of Mr. *Tryon*, and taking thence 47*l.* of the Money of *Hills*; but we all agreed that *William Turner* being formerly indicted for Burglary in breaking the House of Mr. *Tryon*, and stealing his Goods, and acquitted, he cannot now be indicted again for the same Burglary for breaking the House; but we all agreed, he might be indicted for Felony, for stealing the Money of *Hill*. For they are several Felonies, and he was not indicted of this Felony before, and so he was indicted. And afterwards I told my Lord Chief Justice *Bridgeman* what we had done, and he agreed the Law to be so as we had directed.

Will. Turner's
Case.

If one break an House in the Night, steal Goods thence of several Men, and be indicted for that Burglary, and stealing the Goods of one of the Men, and be acquitted, he cannot be afterward indicted for the Burglary, but may for the Felony, for stealing the Goods of other Men, which were taken out of the same House.
2 Hawk. 519.

[31]

At the *Lent Assizes* at *Cambridge*. 16 Car. 2. *Clement Simson* was indicted for breaking an House in the Day Time, no body being in the House, and stealing Plate to the Value of 10*l.* And upon the Evidence it appeared, that he had taken the Plate out of a Trunk in which it was, and laid it on the Floor; but before he carried it away, he was surprised

Simson's Case.
Removing Goods from one Place in an House to another by a Thief, who intended to steal them is Felony,

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tho' he be surprized before he carry them away. And if a Thief do so in the Daytime, by breaking an House no body being therein, his Clergy is taken away by Stat. 39 *Eliz.* if the Goods be above the value of 5s.
 1 Hawk. 147.
 1 H. P. C. 508.
 527.
 2 H. P. C. 358.
 Foff. 108.
 1 Hawk. 147.

Husband and Wife commit Larceny or Felony together, no Felony in Wife, but only the Husband is guilty, otherwise in case of Murder both guilty.
 1 Hawk. 4.
 148. and in nota.

prised by People coming into the House. And the Chief Justice *Hyde* caused this to be found Specially, because he doubted upon the *Stat. of 39 Eliz. Cap. 15.* That enacts, that if any one be found guilty of the Felonious taking away any Goods, &c. out of any House in the Day-time, above the Value of 5s. he should not have the Benefit of his Clergy, Whether this were a taking away within the Statute. And on the 13 *June, Car. 2.* All the Judges being met together, this Question was propounded to them, and agreed that Clergy was taken away in this Case. For the *Stat. of 39 Eliz.* does not go about to declare what shall be Felony, but to take away Clergy from that kind of Felony. For breaking an House in the Day-time, no body being therein, and stealing Goods above the Value of five Shillings, so that the Felony is at Common Law; And by the Common Law, breaking the House and taking of Goods, and removing them from one Place to another in the same House, with an intent to steal them is Felony; For by this taking them he hath the Possession of them, and that is Stealing and Felony. *Vide* for this 27 *Aff. Pl. 39. Br. Corone* 107.

At the same Time it was propounded to all the Judges If a Man and his Wife go both together to commit a Burglary, and both of them break a House in the Night, and enter and steal Goods; what Offence this was in the Wife, and agreed by all, that it was no Felony in the Wife? for the Wife being together with the Husband in the Act, the Law supposeth the Wife doth it by coercion of the Husband, and so it is in all *Larcenies*; but as to Murder, if Husband and Wife doth join in it, they are both equally guilty, *Vide* 2 *E. 3. F. Corone* 160. 27 *Aff. Pl.*

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Pl. 40. *F. Corone* 199. *Poulton de pace* 126.¹ And the Case of the Earl of *Sommerfet* and his Lady, both equally found guilty of the Murder of Sir *Thomas Overbury*, by poysoning him in the *Tower of London*. 1 St. Tr. 348, 351.

[32]

At the Goal Delivery for *Newgate*, holden 31 August, 16 Car. 2. my Lord *Bridgeman*, myself, and my Brother *Wylde*, Recorder of *London*, being present; *Ann Davis* was indicted for murdering her Male Bastard Child, and the Indictment was not special as the Statute is for concealing it, &c. But the Indictment was *quod Infantem masculum vivum parturiit qui quidum infans masculus adtunc & ibid. vivus existens natus per legem hujus regni Angl^e spurius fuit, Anglice*, a Bastard, and then goeth on in the ordinary Form, that she murdered it, and doth not conclude *Contra formam Statut*. And it was doubted by us, whether the Indictment ought not to be special. And we caused Precedents to be searched, and 2 Car. 1. there was a special Indictment, but after 4, 5 & 6 Car. 1. All the Indictments were as this is, and Mr. *Lee*, Clerk of the Peace for *London*, said that the Form was altered, and made as it is now by the Advice of the Judges at that Time, who agreed that Clause which is now in the Indictment, should be put in, and to conclude generally *contra pacem, &c.* and not to conclude, *contra formam Statut*. For Murder was an Offence at Common Law; and the Statute declareth, that where the Child is concealed, it shall be taken, to be born alive, and if it be dead it shall be taken, that it was murdered, and so the Statute doth not make a new Offence, but maketh a Concealment to be an undentable Evidence that she murdered it; and so the Court

Ann Davis's Case.

1 Hawk. 90, 95.
Stat. 21 Jac. 1. c. 21.

Form of Indictment for Murdering Bastard Child upon search of Precedent.

2 Hawk. 334-5, 345, 613.
2 Hale 288-9.

2 H. P. C. 289.

¹ In some editions page 130.

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Special Verdict. Court was satisfied, and went on upon the Indictment, and upon the Evidence it appeared, that the Prisoner lived in a Chamber by herself, and went to Bed on *Thursday* Night well, without any Pain, and in the middle of the Night waked full of Pain, and knocked for some body to come to her, and one Woman heard her knock, but came not to her, and the same Night she was delivered of a Child, and after she put the Child in a Trunk, and did not discover it till *Friday* Night following, and this was all found specially to have the Advice of all the Judges, whether that knocking for help at the Time of her Travel (altho' she concealed it after one Day) exempts her from that Statute. For there was no sign of any Hurt upon the Body of the Child. But thus far it was agreed by us, that if there be an intent in the Woman to conceal the Child, then it is Murder by that Statute, though in truth the Child was dead [33] born. But if there was no Intent to conceal it, or if *she confess herself with Child* before hand, and after she is surpris'd and delivered, no body being with her, this is not within the Statute, because there was no intent to conceal it; and therefore in Case, if there be no sign of hurt upon the Child, it is no murder.

If no intent to conceal the Child, not Murder within the Statute.
2 Hawk. 617.
2 H. P. C. 289.

Fulk Bellus's
Case.
Departing from his Captain.

Statutes of 7
H. 7. 3 H. 8
are perpetuall
Statutes.

At the same Sessions one *Fulk Bellus* was in *Newgate* committed for Felony for departing from his Captain without licence, and the King having given order that for the example of others he should be carefully prosecuted, my Lord *Bridgeman*, my selfe and my Brother *Wylde* lookt over the Statute concerning this point, and as it is agreed in the case of souldiers *Co. 6. 27. [Crs. Car. 71. 3 Inst. 86.]* the *Stat. 7 H. 7 C. 1. and 3 H. 8. C. 5.* were found to be the materiall Statutes (which two Statutes were of the same effect and penned in the same words);
wee

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wee found a great difference for the *Stat. 7 H. 7.* extends only to souldiers retained to serve the King upon the sea (and not to such as are retained to serve the King here in England); but the *Stat. 3 H. 8.* extends to all souldiers retained to serve the King upon the sea or land or beyond sea, and therefore wee agreed to proceed upon this *Stat. of 3 H. 8.* so made the Indiſtment generall that he was retained to serve the King in his warrs without expressing where, because that Statute extends to all places which not being observed before they laid in the Indiſtment the place either on sea or beyond the sea where the souldier was retained to serve, which needs not proceeding upon the *Stat. of 3 H. 8.* as it is best to doe; and wee lookt upon the Case reported by Justice *Crook, Pl. 3. Cor. fol. 71.* and the same Case reported by Justice *Hutton, fol. 134.* where it is resolved by 9 Judges against 3 that though these Statutes mention only Captains, yet a departure from a Conductor is within the Statute and upon the question whether Tryall may be had before Justices of *Oyer et Terminer* because the Statute says that the Tryall shall be before Justices of Peace. Justice *Croke* reports that the greater opinion was that Tryall might be had before Justices of *Oyer et Terminer*, and Justice *Hutton* reports it then to be unanimously agreed by all the Judges That if one take presse mony and when he should be delivered over to his Captain or conductor he withdraw himself this is no Felony, although he be hired and retained to serve, for by the Statute it must be a departure from his Captain, which is not before he be received or delivered over to his Captain, &c., and wee observed a mistake in former precedents of Indiſtments against souldiers for departing from their Captains, &c.

The difference between those two Statutes.

Indiſtment generall on the Statute.

[6 Co. 27.]

Conductor^a a Captain within the Statute.

Tryall before Justices *Oyer et Terminer*.

Justices of the Peace.

Press mony taken and departure before delivered to Captain no felony.

Mistake in former Indiſtments.

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ments as to
some words in
the Statute by
referring that
to the Souldier
which ought to
be referred to
the Captain.

&c., for those Indictments were that of *A. B. existens miles et o capitaneus et adhuc et ibidem immediate retentus cum dicto domino Rege &c.*; and so they applyed the immediate *retentus* with the King to the souldier, which ought not to be, but is applicable only to the Captain, and then these words (being no Captain immediately retained with the King) is one parenthesis, and these words of immediate retainer with the King are applicable to the Captain, and so the sence is plain, if any souldier (being no Captain immediately retained with the King) which hereafter shall be in wages and retained to take the preys to serve the King &c. those last words are applicable to the souldier and so directed the Indictment.

A needlesse
Clause in former
Indict-
ments.

And because the Statute makes the Tryall in the County where the offender is taken; therefore the former precedents show that the Court had Jurisdiction to adde this Clause in the end of the Indictment, *Et ulterius Juratores prædicti super sacramentum suum præsentant quod prædictum A. B. (viz: the souldier,) such a day and such a place in the County where he is indicted pro feloniam prædictam captus et accusatus fuit*, which Clause I conceive to be needlesse, because if the Tryall be not in the same County where he was taken, either the prisoner may move it, and also the Court which is of Counsell with the prisoner ought not to suffer the Tryall to go on, and indeed in such case that they have not jurisdiction, and therefore the Court *ex officio* will look to it, that they have jurisdiction, and that the Tryall be as it ought to be by law, and it is never used to putt in Clauses into Indictments to manifest the Jurisdiction of the Court. And in the next place it was considered whether the Indictment to be

vi

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vi et armis, and Mr. Lee, the Clerk of the Peace for London, and Mr. Shelton Clerk of the Peace for Middlesex said that they never putt in *vi et armis* in any Indictment for an offence merely created by a Statute save only in an Indictment for a forceable entry where force is the matter of the offence, but never upon the Statute for keeping Alehouses without licence, or for keeping unlawfull games or any other case of the like nature where the Indictment is merely upon a Statute although it be for a malefiance. But in Indictments at Common Law for a malefiance they always putt in *vi et armis*, but in Indictments for a malefiance at ¹ Common Law they never use those words, for a malefiance cannot be *vi et armis*, and therefore in this case of a souldier's departure they thought it need not be laid *vi et armis*, and of that opinion all were, but because the former precedents were *vi et armis* and wee conceived those words would do no hurt because every malefiance is in law a force being against an established law, therefore wee ordered these words should be putt into the Indictment.

In what cases
vi et armis
ought to be in
Indictments
and in what
not.

Juratores predicto domino Rege super sacramentum suum presentant Fulkrum Bellum Imprimis de Parochia sanctæ Margarette Westminster in comitatu Middlesex labourer 11 die Januarii anno regni domini nostri Caroli 2^{di} dei gratia Angliæ Scotiæ Franciæ et Hiberniæ Regis Fidei defensoris &c. ibidem apud parochiam prædictam in comitatu prædicto existens miles Anglicè a Souldier (et ò capitaneus immediate rententus cum domino Rege) salarium recipiens Anglicè being in wages et retentus ad serviendum dicto domino Regi in Guerris suis ut miles.

A Copy of this
Indictment.

Idem

¹ So worded in manuscript, but query "Statute."

I think the Indictment ought to be voluntarie et felonice discessit.

Absence by reason of drunkenesse if not done by design, not within the Statute. It must be a willfull withdrawing.

Souldier retained generally, King may send him where he please.

Idem Fulk Bellus sic ut præfertur miles existens et salarium recipiens et retentus ut præfertur cum domino Rege ad deserviendum eidem Domino Regi in Guerris ut miles post eandem retentionem et salarii receptionem scilicet dicto 11 die Januarii anno supra dicto apud Parochiam prædictam in comitatu prædicto a servicio dicti domini Regis sine licentia dicti domini Regis sive ejus locum tenentis vi et armis felonice discessit in magno contemptu dicti domini Regis nunc coronam et dignitatem suas &c. et contra formam Statuti in hujusmodi casu nuper editam et provisam &c. Upon this Indictment he was arraigned, and pleaded o culp: and upon the evidence the case was that he was generally retained to serve the King as a souldier, and the King having occasion to send souldiers to Tangier ordered a certain number to be taken out of every Company, and amongst them *Bellus* the prisoner was one who was appointed on Thursday to be ready to goe the next day, to which the said *Bellus* shewed himselfe willing, but that night to take leave of his friends, he fell a drinking and was drunk and so came not to his fellows, but they went away without him, and about 4 days after this *Bellus* came to his Captain of his own accord and submitted himselfe to him, and confessed his fault, and because it did not appear that he did wilfully depart or withdraw himselfe but was overtaken with drinke, therefore wee discharged the Iury of him. And the next day my Lord *Bridgman* acquainted the King with what he had done, and he was well pleased and said God forbid he should have been hanged for being drunk. But in this Case wee did agree that if any one be retained generally to serve the King as a souldier, the King may employ him as he thinketh fitt either here or beyond sea.

And

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And wee did agree that in case a battel were to be fought, and that day which it is to bee, a souldier withdraw himselfe from it this is a departure within this Statute, for he had as good depart for ever as at that time in which there is greatest occasion to use him.

Souldier absent day of battel is departure if voluntary and I conceive drunkenness no excuse at such a time.

But in case a Souldier be commanded on the Guard one night and absent himselfe, whether this be a departure within the Statute wee did not deliver any opinion, as concerning that was an offence for which his Commander might give him such punishment as is usuall for not performing his duty, and the mischeife is not so great as to expound every such fault to be capitall.

Souldier absent from the Guard vide opinion.

At the same Sessions *Joseph Clarke* was indicted in *London* for High-Treason, for Coining of Money, and upon the Evidence it was proved against him in *London*, as it ought to be, the Indictment being there, but a great deal of more Evidence was given against him of committing the same Crime in *Middlesex*, and in *Essex*, which was agreed to be good Evidence to satisfy the Jury.

Joseph Clarke's
Case for coining of Money.

Vide Devant.
15, a.

One *Richard Oliver* who had been partner with him in the Crime, and formerly convicted for that Crime, and had obtained the King's Pardon, was used as a Witness against him, together with other Witnesses. And it was agreed by us all, that the bare uttering of false Money, though the Party know it to be false Money, is not High-Treason, nor Misprision of Treason; For nothing is Misprision of High-Treason but concealing it, yet the uttering of false Money is a great Misprision finable, if the Party know it to be false: But if he that utters it know the Person that coined it, or if one help a Coiner with Instruments and Tools to coin withal,

Oliver's Case.
2 Hawk. 603.
1 H. P. C. 304.
in nota.

1 Hawk. 20,
44-

or

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or furnish him with Silver for his coining, and Money is coined accordingly, in every of these Cases it is High-Treason in them who utter the Money, or assist the Colner with Materials, for they are all aiding to the Treason; and in High-Treason, every one who giveth aid or assistance to it, are Principals; for there are no Accessaries in Treason, and they are guilty of Coining as well as he that coined it.

A Form of a Conviction for High Ways, by the View of a Justice of Peace, which he is to return to the next Sessions, and a Form of an Order thereupon, which I had from my Lord Hyde.

Bedford.
1 Hawk. 696
" seq.

Memorandum quod Un' — Justiciar' Dom' Regis ad pacem in Com. præd. conservand' nec non ad diversas felonias & transgression' & al. malefacta in eod. Com' perpetrata audiend' & terminand' assignat' ad hanc Generalem Sessionem. Pacis Com. præd. tent. apud — infra Com. præd. — die &c. Anno Regni Dom, &c. coram præfat. — & — Justic. pacis in Com. præd. virtute Statut. Dom. Eliz. nuper Regina Angl' in Parlamento tent' apud Westmon' 12 die Jan. Anno nuper Reginae 5 & secundum formam & effectum dicti Statut. Intitulat. An Act for the reviving of a Statute made An. 2 & 3 Phil. & Ma. for the mending of High-ways, super propriam notitiam suam presentavit qd. Quædam cumunis & Antiqua Regia via infra paroch. præd. in Com. præd. quæ ducit de Paroch. præd. ad de-villam in Com. præd. (mercatoriam villa existen.) a quodam loco vocat. in Paroch. præd. usque ad quendam pontem communiter vocat. in Parochia prædicta. non est bene & sufficient. reperat. & emendat. secundum formam & effect. Statut. præd. sed modo est in magno decasu ita quod subditi dic. Dom. Reg. per viam præd. cum equis, plaustris, Carrucis & Carriagijs & al' necessarijs suis prout solebant & debent [34]

bent absque magno periculo transire seu laborare non possunt in cuius rei testimonium præd.—manum & sigillum suum apposuit.

Super quo ad eandem Generali Sessionem pacis ibid. tent. die & anno supradictis, præd. Justiciarij Dom. Regis ad pacem Dicti. Dom. Regis in Com. præd. conservand. assig. nat. assessaver. & imposuerunt finem 40l. levand. de Inhabitantibus dicti Paroch. de—in quorum Defectu via præd non est bene & sufficienter reparat secund. formam Stat. præd. si præd. via non sit sufficienter reparat. & emendat. ante Festum sci Johannis Baptist. prox. futurum.

Ordo super inde.

[35] *Memorandum, Upon such a Conviction the decay of the High-way cannot be traversed, but they may plead, that some other Person ought to repair it, and traverse that they ought not, but the decay being upon View of a Justice of Peace cannot be gain said or traversed.*

What only is traversable on this Conviction. *Vide Saunders Rept. vol. 2. p. 160.*

This is the best way to have all High-ways amended if the Justices of Peace would do their Duty. My Lord *Hyde* also told me, that it was resolved by all the Judges in *Gaye's Case*, 2 *Car. 1.* that if a Recusant who was proclaimed at the Assizes according to the Statute, render himself the next Assizes to plead or traverse, &c. he must appear in Person, and he is to be in Custody; for the Words of the Statute and of the Proclamation are, that he shall render his body to the Sheriff of the County.

Gaye's Case. Recusant after Proclamation to appear in Person, and to be in Custody.

Wharton, Young and Purefoy were indicted for murder, and the Jury contrary to their evidence found them not guilty of murder at which the Judges viz: *Popham, Gawdy and Fenner* were very angry, and committed the Jury to prison and fined them and bound them to their good behaviour, &

Jurors fined in Criminal

Cro.

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Causes and also
in Civil Causes.

Vide postea p.
50.
3 Bulst. Rep.
173,
Noy. Rep :
W'harton's Case,
48, 49.
Yel. 23.

In what Cases
Jurors may
have meat and
drinke before
they have
agreed their
verdict.

Felony in
Goods, not-
withstanding
the Delivery of
them.
1 Hawk. 143
144, *et seq.*
1 Hale 505,
667.

Restitution of

Cro. El. 779. in appeal by *Watts* against *Brayn* for the murder of her husband the Jury fined for delivering first a verdict of not guilty by agreement. Whereas all were not of that mind, though after being sent back they found him guilty. These were in criminall cases—But the 8 *Afs. Pl.* 35. in an Assise a Juror was committed to prison because he would not agree with his Companions, but kept together a day and a night without good cause, but at last he did agree with them, and *vide Dr. & Stud.* 18th Edit. Cap. 52. 271. that in civil causes if a Jury will not agree the Court may fine them, and in the same place, that a Jury by leave of the Court may have meat and drinke and other necessaries in case any of them be not well, but then it must be either at the charge of the Jurors themselves, or at the equal charges of the Plaintiff and Defendant, but not at the charge of one of them.

At the Sessions in the *Old Bailey* holden there the 12 October 1664. A *Silk Throster* had Men come to Work in his own House, and delivered Silk to one of them to Work, and the Workmen stole away part of it. It was agreed by *Hyde* Chief Justice, myself, and Brother *Wylde* being there, that this was Felony, notwithstanding the delivery of it to the Party, for it was delivered to him only to Work, and so the entire Property remained then only in the Owner, like the Case of a *Butler*, who hath Plate delivered to him; or a Shepherd, who hath Sheep delivered, and they steal any of them, that is Felony at the Common Law, *Vide* 13 *Eliz.* 4. 10. 3 *H.* 7. 12. & 21 *H.* 7. 14. accord. *Poulton de pace* 126.¹

At the same Time there being Discourse, about the restitution

¹ In some editions page 130.

restitution of Goods stolen, (to the Owner, who had prosecuted the Thief) my Brother *Wylde* said that it had been resolved upon the Words of the *Stat.* of 21 *H. 8. Cap. 11.* which giveth restitution of stolen Goods to the Owner in case the Thief be upon his Evidence found Guilty, that notwithstanding a Sale in a Market Overt by the Thief of the Goods stolen; yet the Party shall have Restitution: And he said, so was the Practice at the *Old Baily*. But my Lord *Hyde* and myself, were of a contrary Opinion, because at Common Law, a Sale in a Market Overt by a Party who hath no Property shall bind the Right of the true Owner, and so is *More Rep.* 360. The Bishop of *Worcester's* Case, where to a Restitution granted at a Sessions of *Newgate*, the Party who had brought the Goods pleaded a Sale to him in a Market Overt, there the Case was adjudged against the Defendant, because it appeared not to be a Sale in a Market Overt. For it was Plate sold in

[36] a Scrivener's Shop in *London*. But there no Question is made, but that a Sale in a Market Overt would have hindered the restitution, and bound the Property of the right Owner. And by the *Stat.* of 31 *Eliz. Cap. 12.* which in case of Horses stolen, enableth the Owner to have Restitution if he claim them, within six Months after they are sold by the Thief in a Market Overt, and yet that is, if the Owner pay the Party who bought the Horse in the Market Overt, so much as he will swear he paid *bona fide* for the Horse: But this Restitution of Horses upon the *Stat.* of 31 *Eliz.* hath no great Relation to that Restitution upon the *Stat.* of 21 *H. 8.* they being of two several Natures, therefore *Quære legem. Vide postea* 48, a. *con.* and so is the constant Practice.

3 *H. 7. 12. a.* One arraigned before *Fairfax* One challenged *Bryan*.

Stolen Goods,
if grantable to
the Prosecutor
upon the Statute
in case the
Goods were
sold in a Mar-
ket Overt.
2 Hawk. 241.
1 H. P. C. 543.
Popham 84.

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36, hanged and
not pressed.
2 Hawk. 458,
459, 460.
3 Inst. 227.

Bryan, and *Haugh* at *Newgate* for Felony, challenged 36, and the Question was, what should be done with him, and all the Judges of the one Bench and the other agreed, that he should be hanged and not pressed to Death, and this Rule they would have all the Judges to observe in their Circuits, notwithstanding the Opinion *tempore E. 4.* to the contrary; and yet in the very same Page it is said in another Case upon the like Challenge, the Book saith the Opinion was, that he should be pressed as a Person that refused the Law.

One abjureth
for Felony, and
being after
taken in *Eng-
land* he stands
mute, he shall
be hanged; but
26 *Aff. Pl.* 19
Br. Payne 12.
is to the con-
trary, but that
seemeth not to
be Law.
2 Hawk. 459,
460.
As to standing
mute, where
the Judgment
shall be to be
pressed, and
where proceed
to Tryal and
put him upon
the Jury.
2 Inst. 178, 9.
2 Hawk. 462.

30 *Aff. Pl.* 3. *Br. Payne* and *Penance* 2. One abjureth and is after taken in *England*, and demanded what he could say, why Execution should not be awarded, he stands mute, he shall be hanged, and not put to penance or pressed; because he was attainted of the Felony before by his Confession: For he cannot have the Benefit of the Sanctuary to abjure, unless he confess the Felony which is entered on Record by the Coroner; and there its said, if a Felon plead not guilty upon his Arraignment, and after stand mute before his Tryal, it is as if he had not pleaded: But if upon his Arraignment he confess the Felony, and after being demanded what he can say, why Execution should not be, he stands mute, there he shall be hanged. *Notes*, It seems to me, that in the Case before, where a Felon pleads not guilty, that if after, upon his Tryal he stand mute, yet the Jury shall be charged with him, and Evidence given for the King; and if he be found guilty he shall be hanged; for after the Prisoner hath pleaded once not guilty he cannot hinder the Tryal, and therefore I suppose that Case is to be intended when the Prisoner only pleaded not guilty, and being asked how he would be tried, stands mute, [37]

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mute, and refuses the Tryal of Law, there the bare pleading of not guilty is as nothing ; but in case he pleadeth not guilty, and for Tryal puts himself on the Country, then if after he stands mute, yet the Court shall proceed to his Tryal, and so the Book of 15 E. 4. 33. Br. p. 9. A Felon is arraigned and pleads not guilty, and puts himself upon his Country, and then challenged 31, and thereupon is a *Tales* granted, and then he stands mute, and the Jury was charged with him and found guilty.

Vide 2 Hawk. 460. Note to Sect. 7.

In an Appeal for Felony if the Prisoner stands mute, he shall have Judgment to be pressed, as in case he had been arraigned at the King's Suit, and stands mute. 43 Aff. pl. 30. Br. Payn. 13 & 14 E. 4. 7. Br. *ibid.* 15.

Mute in Appeal the same Judgment as upon Indictment.

At the Sessions at the *Old Bailey* the 7th Decemb. 1664, one *Jane Jones*, together with one *Thomas Wharton*, were indicted for Burglary, and she pleaded herself to be married to *Wharton*, on Purpose to be excused, being with her husband at the Burglary, and she refused to plead by the Name of *Jones*, and thereupon we called for the Jury, which found the Indictment, and in their Presence, and by their Consent,¹ we made the Indictment as to her Name to be *Jane Wharton alias Jones* ; but we did not call her *Jane Wharton* the Wife of *Thomas Wharton*, but gave her the Addition of *Spinster* ; and then she pleaded to it, and the Court told her, that if upon her Tryal, she could prove that she was married to *Wharton* before the Burglary committed, she should have the Advantage of it : But on the tryal she could not prove it, and so was found guilty, and Judgment given upon her.

Jane Jones Wharton's Case. A Woman in the same Felony with a Man, pretends to be his Wife ; the way of Indictment in that Case.

¹ Hawk. 148. Note to Sect. 32.

At

¹ Note, the Jury Consent at the Time they are Sworn.

Burning in the Hand for Felony, no Exception against his being Witness.

Bulstrode and *part* 155.

2 *Hawk.* 603-10. One attainted of Felony and pardoned is no good Witness. *Modus decimandi* so proved, disallowed.

By the Statute of 18 *Elm.* 7. He who hath Clergy, is totally discharged. *Vide Membr.* *fol.* 25.

If Clergyman burned in the Hand, and after sued to be deprived for that Cause, prohibition. *Vide Co.* 5. c. 110, *Foxley's Case*, and it is in lieu of Purgation, which admits guilty, especially after Judgment and Attainder. 2 *Hawk.* 504, 505.

Marriot's Case. One committed for refusing the Oath of Allegiance, discharged as no such Oath to induce the Penalty of Premunire.

An *Alien* living here, is a Subject within the Statute of Quakers.

At the same Sessions, at the Tryal of a Prisoner, he took Exception against the Witness against him, because he had formerly been burned in the Hand for Felony; but the Chief Justice *Hyde*, *Kelyng*, and *Wylde*, Recorder, being present, held that to be no Exception, and in civil Causes such Persons are frequently admitted for Witnesses; and it differs from cutting off Ears, standing in the Pillory or other stigmatizing, [38] because those Punishments make the Person infamous, and so he is not allowed for a Witness: But burning in the Hand does not so, because it cometh in the place of Purgation at the Common Law, which supposeth he might be not guilty, notwithstanding the Verdict. And therefore at the Common Law, he that confesseth a Felony, could never be admitted to his Purgation, for there could be no Presumption of not guilty against his own Confession. *Vide Godbolt* 288.

At the same Time and Sessions, One *Isaac Marriot*, and others were committed, and the *Mittimus* was for refusing to take the Oath of Allegiance, and so the Justice of the Peace thought to bring them into a Premunire; but the Court discharged him and the Rest, because the Oath intended was the Oath in-joined by the Statute of 3 *Jac. Cap.* 4. and it is not an Oath of Allegiance, though it be commonly so called; but in truth it is an Oath of Obedience, and so the Court discharged them, because there was no such Oath of Allegiance, &c.

At the same Sessions, upon the Tryal of several Quakers for their third Offence after two former Convictions before the Justice of Peace upon the Statute of 16 *Car.* 2. *Cap.* 4. *An Act to prevent and suppress seditious*

sedition Conventicles; One of them pleaded, that he was an Alien born in *France*, and so not within the Penalty of that Act, because the Statute says, *that every Person above the Age of 16 Years, being a Subject of this Realm, shall, &c.* And he said he was no Subject, and so not within the Law: It was agreed by us all, that if an Alien come into this Kingdom, and live under the King's Protection, that as long as he liveth here he is a Subject of this Realm, and punishable for transgressing the Laws thereof, according to *Calvin's Case*, *Co. 7. Rep. 6, b.* and shall be indicted for High-Treason, and the Indictment concludes *contra Allegiant suam debitam*. But if the Statute had said been a Natural-born Subject of this Realm, then it had not extended to him, and that also appeareth by the penning of several Statutes, some being generally Subjects, or all Subjects, &c. which extend to Aliens which live here, and other, that all Natural-born Subjects, which extend to them only who are such, and not Aliens who live here, and accordingly we proceeded against him, and he had Judgment to be transported.

At the same Sessions, *Francis Trollop* was indicted for stealing the Goods of *Matthias Bowyer*, and upon the Evidence it appeared, that the Goods were not *Bowyer's*, that he was a *Glostershire* Carrier, and in his Journey they were stolen from him, and agreed that the Indictment was well enough, for tho' he had not the absolute Property, in the Goods, yet he had a possessory Property, for which he may maintain an Action of Trespass against any one that took them from him; and so may indict a Thief for taking his Goods, and so the Indictment is good either for stealing the Goods of the Carrier or of the right Owner.

Trollop's Case.
A Carrier hath Goods delivered, and is robbed, the Indictment is good, that he stole the Goods of the Carrier.

At

Fabian's Case.
Goldsmith for
falsifying Plate

At the same Sessions, One *Joseph Fabian*, a working Goldsmith, was indicted for falsifying Plate, and by putting in too much Copper, made it some Pieces 2*d.* in others 3*d.* 4*d.* 5*d.* 6*d.* 7*d.* in the Ounce worse than it ought to be, and then corrupted one of the Essay Masters Servants to help him to the old Marks of the *Leopard's Head*, and other Marks which are set on Plate when it is essayed and found good, and with those Marks he marked his false Plate at his own House, and so he sold his Plate to the selling Goldsmiths, who did not mistrust it, because they saw it marked: For the Essay Master is so curious, that if the Plate be the fourth Part of a Farthing more than it ought to be, they break it in pieces, and the old Marks ought always to be broken in pieces when new Marks are made. And because the Essay Master had not caused those old Marks to be broken, he was turned out of his Office, and *Fabian*, who was found guilty, fined 100*l.* and adjudged to stand in the Pillory three Days, from Eleven of the Clock until One, that is to say, once at the *Old Change*, and another Time in *Cheapside*, and the third Time before *Goldsmiths Hall*, with a Paper in his Hat, declaring his Crime, and he was also forejudged of his Trade, that he should not use that Trade again as a Master Workman.

Judgment.

Fore-judged not
to use his Trade
as a Master
Workman.

Hull's Case.

In the Sessions in the *Old Bailey* holden the 13 of [40]
January 1664, One *John Hull* was indicted for the Murder of *Henry Cambridge*, and upon the Evidence, the Case was, that there were several Workmen about building of a House by the Horse-Ferry, which House stood about 30 Foot from any Highway or common Passage, and *Hull* being a Master Workman (about Evening when the Master-workman had

had given over Work, and when the Labourers were putting up their Tools,) was sent by his Master to bring from the House a piece of Timber which lay two Stories high, and he went up for that piece of Timber, and before he threw it down, he cried out aloud, Stand Clear, and was heard by the Labourers, and all of them went from the Danger but only *Cambridge*, and the piece of Timber fell upon him and killed him: and my Lord Chief Justice *Hyde* held this to be Manlaughter, for he said he should have let it down by a Rope, or else at his Peril, be sure no Body is there: But my Brother *Wylde* and myself held it to be Misadventure, he doing nothing but what is usual with Workmen to do: And before he did it, crying out aloud, Stand Clear, and so gave notice if there were any near they might avoid it; and we put the Case, a Man lopping a Tree, and when the Arms of the Tree were ready to fall, calls out to them below, Take Heed, and then the Arms of the Tree fall and kill a Man, this is Misadventure; and we shewed him *Poulton de pace* 120¹, where the Case is put, and the Book cited, and held to be Misadventure; and we said this Case in Question is much stronger than the Case where one throws a stone or shoots an Arrow over a Wall or House, with which one is slain, this in *Kelloway* 108 & 136. is said to be Misadventure. But we did all hold that there was a great difference betwixt the Case in Question, the House from which the Timber was thrown standing thirty Foot from the High-way or common Foot-path, and the doing the same Act in the Streets of *London*; for we all agreed, that in *London*, that if one be a cleansing of

Manlaughter
and Misadventure in what
Cases.
1 Hawk. 85.
1 H. P. C. 475.
Fost. 263.
*See the Rules
there laid down.*

London Streets
and a Country-
town much
differ.

a

¹ In other editions 123.

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Murder.
1 H. P. C. 475.
in nota.
Fost. 263.
1 H. P. C. 472.
1 Hawk. 85.
Braet. l. 3, 64.
Dalt. Cap. 96.
B. Cor. 229.

Rampton's Case.
Manslaughter,
Misadventure.
1 Hawk. 85.

a Gutter, called out to stand aside, and then throw down Rubbish, or a piece of Timber, by which a Man is killed, this is Manslaughter; being in *London*, there is a continual concourse of People passing up and down the Streets, and a new Passenger, who did not hear him call out, and therefore the casting down any such Thing from an House into the Streets, is like the Case where a Man shoots an Arrow or Gun into a Market-place full of People, if any one be killed it is Manslaughter; because in common Presumption his Intention was to do Mischief, when he casts or shoots any Thing which may kill among a multitude of People; but in case that an House standing in a Country-town where there is no such frequency of Passengers, if a Man call out there to stand aside, and take heed, and then cast down the filth of a Gutter, &c. my Brother *Wyld* and I held that a far differing Case from doing the same Thing in *London*. And because my Lord *Hyde* differed in the principal Case, it was found Specially, but I take the Law to be clear, that it is but Misadventure. [41]

At the same Sessions *James Rampton* was indicted for the Murder of his Wife; and upon the Evidence the Case was, that he being a *Hackney Coachman*, found a Soldiers Pistol in the Street, and when he came home he shewed it to his Master, and they took the Gun-stick and put it into the Pistol, and it went down into the Muffel of the Pistol, by which they thought it was not charged, and his Wife standing before him, he pulled up the Cock and the Pistol went off, and being charged with two Bullets, wounded her in the Belly, and killed her, upon which he cried out, Oh I have killed my dear Wife! and called in Neighbours, it was holden by *us all*,
that

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that this was Manslaughter, and not only Misadventure.

Quere.¹

At the Common Law, if a Man had committed several Felonies, and had been arraigned for one, and prayed his Clergy, yet he might be indicted for any other Felony, and thereupon was made the Statute of Clergy, 25 *Ed. 3. Stat. 6, C. 5.* which required that a Clerk be charged with all Felonies, at once. And after that Stat. if a Man had committed several Felonies, some within Clergy and some without Clergy, and had been arraigned of one of the Felonies within Clergy and convicted of it, and his Clergy allowed for that, he was discharged thereof and could not be tried for any of the other Felonies which were committed betwixt the first Felony and the Time of the Allowance of his Clergy for it, tho' the other Felons was without Benefit of Clergy, [42] *Stam. pl. Cor. 107, b. Coke. pl. Cor. 214.* but now by the Statute of 8 *Elix. C. 4.* if Clergy be allowed, that doth discharge all other Felonies within Clergy; but he may be arraigned for a Felony, for which Clergy is not allowable, though it were committed before his Clergy were allowed: *Co. Pl. Cor. 214.* But now by the Statute of 18 *Elix. C. 7.* it seems that although Clergy hath been allowed for one Felony he may be indicted for another Felony also within Clergy committed before the Time that his Clergy was allowed; for that Statute of 18 *Elix.* speaks generally that all Persons admitted to the Benefit of the Clergy shall notwithstanding answer to all other Felonies whereof they shall be indicted or appealed, and not being thereof before acquitted, convicted

Clergy allowed where may be put to answer for other Felonies notwithstanding.

Vid. Recital 8. El. Cap. 4. agreed the Law so. 2 Hawk. 527.

¹ The learned Editor was not satisfied with this Judgment. See *Foß. 263, 264, 265.*

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convicted, attainted, or pardoned; and if this be not the meaning of this Statute, then it is to no purpose; for all the other Cases where Clergy was not allowable were helped by the Statute of 8 *Eliz. Cap. 4.* before mentioned. And my Lord Chief Justice *Hyde* told me that when his Uncle Sir *Nicholas Hyde* was Chief Justice, he meeting with a notorious Rogue for stealing of Sheep and Cows all being within Clergy, caused him to be tryed upon one of the Indictments, and presently called the Ordinary, and upon his return, that he read, he allowed him his Clergy; and then after he tryed him at the same Assizes upon the other Indictments, upon which he was convicted, and demanded his Clergy, which he denied him, because he had had his Clergy once allowed him, and so the Fellow was hanged: But yet the Practice at the Sessions at the *Old Bailey* is contrary to this, and so that Statute of 18 *Eliz.* made of no Effect. *But notwithstanding the Practice is conceived to be according to Law.*

Le Mott's Case.
Burglary in
fraudem Legis.

1 Hawk. 131.
1 H. P. C. 507.
1 H. P. C. 552.
4 Black. Com.
225.

At the Sessions I inquired of *Le Mott's Case*, which was adjudged in the Time of the late Troubles, and my Brother *Wylde* told me, that the Case was this: That Thieves came with intent to rob him, and finding the Door locked up, pretending they came to speak with him, and thereupon a Maid Servant opened the Door, and they came in and robbed him, and this being in the Night Time, this was adjudged Burglary, and the Persons hanged; for their Intention being to rob, and getting the Door open by a false Pretence this was in *fraudem Legis*, and so they were guilty of Burglary, though [43] they did not actually break the House, for this was in Law, an actual breaking, being obtained by fraud to have the Door opened; as if men pretend a Warrant to a Constable, and bring him along with them

them, and under that Pretence rob the House, if it be in the Night, this is Burglary.

At the Goal delivery in the *Old Baily*, 5 April, 1665, my Lord Chief Justice *Hyde*, myself, and my Brother *Wylde*, Recorder of *London*, then present, one *Richard Farre*, and *Eleanor Chadwick* were indicted for breaking the House of *Robert Stanyer*, and putting his Wife in fear, and stealing from thence several Goods; and upon the Evidence, the Case was that Mrs. *Stanyer* whose House was robbed, had for many Years lived from her Husband, and hired this House, and a Lease was drawn up for the House in her Husband's Name, which he refused to seal, and said he would have nothing to do with, but the Landlord and she agreed, and she constantly paid the Rent, and had the House very well furnished, and had Plate, Jewels, and Household Stuff of very good Value, and *Farre* the Prisoner, and *Eleanor Chadwick*, who lived with him as his Whore, and so had done a great while, intending to rifle her House, laid this Design, viz. *Farre* went to an Attorney of the *Common Pleas*, and told him that Mrs. *Stanyer* was his Tenant and in Arrear for Rent, and he had no way to get her out but by *ejection. firma*, and thereupon, he according to the Way now used, made a casual Ejector of his own and delivered a Declaration, and *Eleanor Chadwick* made a false Oath in the Common Pleas, that she had delivered a Copy of that Declaration to the Tenant in Possession, and thereupon Judgment was obtained (according to the Course) against the casual Ejector, and a Writ to the Sheriff to deliver Possession, and thereupon *Farre* got the Sheriffs Bailiffs to execute the Writ, and turn Mrs. *Stanyer* out of Possession, and at the same time *Farre* took out a *Latitat* against

Farre's and Chadwick's Case.
1 Hawk. 133.
1 H. P. C. 552.
Foster 77.
Robbers in *fraudem Legis* by colour of Lawful Pretences.

Vide postea Cas. Jey's and Cotter's Case, p. 62.
1 Hawk. 133.
1 Sid. 254.
S. C.
Raym. 276.

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Mrs. *Stanyer*, supposing a debt, and at the same Time arrested her and would take no Bail, but caused her to be carried to *Newgate*, and then *Farre* and *Chadwick* went to rifle her Goods in the House, and broke open Cubbards and Trunks, and took away Jewels and Plate, and carried them into his own House, and hid them there, and carried away divers of the Goods by Night, and took the Pewter which had her Husband's Arms upon it, and got them taken out, and sold other of the Goods; and after upon Complaint to my Lord Chief Justice, by his Warrant *Farre's* House was searched, and the Jewels and Plate there found, and divers other Goods; and *Farre* and *Chadwick*, upon Examination by my Lord Chief Justice, were sent by him to *Newgate*, and now this Indictment preferred against them, and *Farre* being asked what colour of Title he had to the House, could pretend none, but it appeared that the true Landlord had received the Rent of it for many Years, and that no Rent at all was behind. And *Farre* being asked what cause of Action he had against Mrs. *Stanyer* to cause her to be arrested, could pretend none; and being likewise asked what colour he had to break open Trunks and Cubbards, and to take the Goods and sell them, and cause the Coat of Arms to be expunged, he could make no pretence; and it was agreed by us all, that although they had made use of the Law and Officers of Law to get the Possession and arrest the Woman, yet if all this done in *fraudem Legis* with intent to Rob, this course was so far from excusing the Robbery, that it heightened the Offence by abusing the Law, and the Process of it without Colour of Title, &c. As *Co. Pl. Cor.* 64. if Thieves pretending to be robbed, raise Hue and Cry, and call a Constable in

in the Night, and cause him to search an House on pretence the Thieves are there, and thereupon, by Command of the Constable, the Door is opened, and they go in, and then rob the House, this is Burglary, though the House was not actually broke open by them, but opened at the Command of the Constable, for this being *in fraudem Legis* shall be accounted as an actual breaking in them, and so was *Le Motte's* Case adjudged, which is in this Book the next Case before this, and so it hath been adjudged, that if Goods be distrained, and put in a Pound, and one who hath a Design to steal them, goeth to the Sheriff and gets a Replevin for these Goods, and by colour of this Replevin, the Goods are delivered to him, and he driveth them away and sells them, having no colour of Title to them, this is Felony. And we also agreed, that altho' Mr. *Stanyer* the Husband did not dwell in this House, and refused to have to do with it, yet the Indictment was well, for breaking open his Dwelling House, for whatever the Wife hath is the Husband's in Law, and it cannot be said to be the Wife's House, and so Direction was given to the Jury, that if they did believe that the Prisoners had done all this with an intent to rob, they ought to find them guilty, and the Jury did find them guilty, and both of them had Judgment to be hanged, and were executed accordingly.

[45]

At the same Sessions, one *Edward Parret* was in the Place where the Prisoners use to stand at the Goal-delivery, who was in for Murder, for which he had afterwards Judgment, and while he was there, one *John Copeland* a *Scotchman*, being in very good Clothes, went in thither under colour to see him, and watching the Time when the Keepers were busie, he opened the little Door which was bolted, and went out,

1 Hawk. 131,
133.

Copeland's Case.
Rescuing a
Felon by secret
helping him
away from the
Place where
Prisoners are
put at the Time
of Tryals in the
Old Baily.

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Vide Stamford
Pl. Car. 30, 31,
32.
Of breaking
Prison and
Rescous.

out, and *Parret* the Prisoner followed him, and the Keeper of the outward Door not knowing them, opened that to them, and they both went together out of the Yard, and run down By-Allies into *Shew-Lane*, and so to *White-Fryers*, but the Keepers presently missing the Prisoner, made after them, and being told which Way they run, overtook them in *White-Fryers*, and brought them both back, and thereupon *Copeland* was indicted for Felony, for rescuing *Parret*, being indicted for Murder, and upon the Evidence it was sworn that after they were taken, *Copeland* said he had done nothing but what he ought to do to help away his Friend, who was in danger of his Life, and on this Evidence he was found guilty, and on his Request he being to have Clergy, it was allowed to be put into the King's Pardon, amongst those Prisoners of that Nature, who were to be sent beyond the Sea, it having been lately used, that for Felonies within Clergy, if the Prisoner desire it, not to give his Book, but to procure a conditional Pardon from the King, and send them beyond the Sea to serve 5 Years in some of the King's Plantations, and then to have Land there assigned them according to the use in those Plantations, for Servants after their Time expired, with a Condition in the Pardon to be void if they do not go, or if they return into *England* during seven Years, or after without the King's License.¹

House robbed
in the Night
after Goods
brought into it,
and whilst he
is removing
thither.

At the same Sessions one was indicted for Burglary, [46]
for breaking open a House in the Night, and stealing away Goods, and upon the Evidence, the Case was, that he whose Goods were stolen, had hired the House

¹ As to Transportation, see 1 Hawk. 426, Ap. 13th, and 2 Hawk. 507, Chap. 33, continued per totum.

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House which was broke open in the Night, and had the Possession delivered him, and had removed several of his Goods from the House he formerly lived in, to the House which he had newly hired, but lay in his first House till he had removed the Rest of his Goods, and fitted his new House, by setting up Beds to lie there: And in this Time, before he had lodged in his new House, that House was broke open in the Night, and his Goods stolen. And it was doubted whether this were Burglary, because some of us held it could not be said to be his Mansion-house before such Time as he had ever inhabited it, but others of us said it would be a very mischievous Case that Thieves might take such an Opportunity to rob in the Night, and have Benefit of the Clergy; and if a Man have a Dwelling-house, and on Occasion, he and his Family be out of it all Night, and then it is robbed, this is without Question Burglary, and in this Case by taking the House to inhabit, and bringing his Goods thither in order to inhabit, and forbearing the Lodging only untill his Goods and Beds can be set up, this might well be called his Mansion-house, and should be so esteemed in Law, *Idco Quere Legem.*

1 Hawk. 133.
1 H. P. C. 556.
in notis.

At a Gaol delivery when holden in the *Old Baily* for *Newgate*, 10 May 1665, myself and Brother *Wylde* there present, *Richard Thompson*, *Henry Gasse* and *Jane Boodle* 3 Quakers, were indicted for the 3rd offence for being at an unlawfull conventicle at the Bull & Mouth the 2nd day of Aprill last being the Sunday after Easterday on pretence of religious worship with divers others above the number of 5 of the same family, &c., and upon the evidence, the two former convictions of them all were produced and read, and then severall witnesses sworn who proved

Seditious Meetings of Quakers.

It was proved that there was no preaching or prating to them.

proved they were all at the Bull and Mouth the said 2nd of April with above 20 others, and the witnesses being asked what they were doing depofed that they could not tell, but faid when they were brought before the Juſtice of Peace ſome of their Company being asked, what they were doing made answer that they were ſeeking God in ſpirit, then the priſoners being asked what they were a doing, one of them ſaid that they were not within the meaning of that Statute, for that Statute is only againſt ſuch who under pretence of tender conſciences in their meetings contrive inſurrections. To which I answered that the preamble in the Act doth recite that ſuch miſcheifs had happened under colour of ſuch meetings, and therefore that Act was made to prevent the occaſion of the like, that they ſhould not have opportunity under colour of ſuch meetings to contrive any ſuch miſcheifs, and therefore the body of the Act prohibits the meetings, and maketh ſuch as are prohibited to be a crime, and that for that they were indicted; for if it could be proved that they were then actually contriveing an Inſurrection, they ſhould be proceeded againſt after another manner than now, viz: for High Treafon, then they asked what they were doing, they answered they were not to accuſe themſelves, to which I told them that they being indicted for an unlawfull meeting the proof lay on their parts to make it appear what they were doing, and ſo to excuſe which they refuſed to doe, then I asked them if they would yett conforme to the Church of England, and by ſo doing they might free themſelves, to which they replied they would not for the Church of England was no true Church, then I gave directions to the Jury and told them that with the two former convictions they had
nothing

nothing to doe, for they were finall and conclusive by the Act of Parliament and not liable to any other examination, but are shewed to satisfy the Court that the prisoners are now duely proceeded against by Indictment they having been twice already convicted, but all they had to doe was to inquire whether they were at the last unlawfull meeting the 2nd of April contrary to the Statute for which they had already heard their evidence, and the directions of the Court, in answer to the objections made by the prisoners, so the Jury went out, and after a long stay, it being about 7 of the Clock in the evening the Jury were sent for to come into the Court whether they were agreed of their Verdict or noe, and after they were come I askt them if they were agreed and they said no, then I took the names of the Jury and asked them one by one whether they were satisfied that they were at the Bull and Mouth on Sunday the 2nd of April, to which every one of them answered they were satisfied of that, next I asked them if they were satisfied that they all were above the age of 16 years, they answered they were, then I asked them if they were satisfied that there were above 5 besides those of the same family, to which they all answered they were, then I askt them what they doubted, they said it was not proved that they were not there under pretence of religious worship in other manner than the Statute appointeth, to which I answered that I had already declared the law to them that they being indicted for being at an unlawfull meeting under pretence of religious service and worship the proof lyeth on their part to make appear what they were doing, for they best knew and can best make it appear, and the proof by law lyeth always upon those

I askt if they believed they were about any secular businesse, they answered they did not then know. I askt them what they thought they were a-doing, they answered, Worshipping of God.

The proof that the Statute requires is the confession of

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the party, proof of witnesses as notoriousness of the fact, and certainly all these circumstances makes notoriety of the fact which is evidence by the Statute, but besides they have evidence by proof of witnesses that they were preaching or prating.

those who in Judgment of Law have best knowledge of the fact and are best able to make it appear if they were about any other business, and to make any other construction were to make the act of no effect, but besides that I told them they had very good and full evidence for that very thing, for first it was deposed by the witnesses that some of their Company being asked by the Justices of Peace what they were then doing, answered they were seeking God in spirit, and they had reason to believe they were all upon the same business. Secondly, these persons were already twice convicted before for being at the same meetings, which may satisfy them what the end of their meetings are. Thirdly, they being asked what they were doing, they answered they were not bound to accuse themselves, which is a kind of confession that they were under pretence of religious worship, especially they refusing to give an account or to make the least pretence that they were about another business. Fourthly, they being asked if they would yett forbear those meetings and conforme to the Church of England, they answered they would not, for the Church of England was no true Church. Fifthly, this Meeting was upon Sunday, and at the Bull and Mouth, which is a place notorious for these meetings as our Churches are for ours; and therefore I advised them, having so full evidence they would doe their duties and not think that Jurys might not take the bitt between their teeth, and do what they list, for if they failed to doe theirs I should not fayle to doe my duty, and so sent them out again, and then they staying a great while I spoke to the Sherifes of London and told them that I expected they should keep the Jury together all night in a room without fire or candle, meat or drinks,

drinckes, or bedding, till the next morning, and then I would come again and take their verdict, and so I gave order to adjourn the Court. Before it was done somebody run to them and told them what direction was given, and then when the Court was adjourning word was brought that the Jury was agreed; soe wee staid till they came, and then I bid the Clerk take their verdict; and they being asked every one whether he was guilty or not they gave their verdict to all 3 that they were not guilty; then I bid the Clerk repeat their verdict, and ask them if it were their verdict; they all said it was; then I bid the Clerk give me the names of the Jury, which he did, and I asked them if they were all agreed of that verdict, then two of them said they were not so. I examined them by the pole man by man, and asked every one of them if they affirmed that verdict, and 10 of them said they did and 2 of them said they did not, but were satisfied that the prisoners were guilty; then I asked those two why they would give a verdict contrary to their oath, the plain evidence and their own Judgment; they said they were overborne by the greater number. I told them that was a great misdemeanour, and they ought before the verdict given to have acquainted the Court with it, and then the Cause of difference would have been examined, and order taken with those who were obstinate against evidence and direction of the Court, and for that I sett a fine of 5 marcs upon those which presently after I did discharge: but for the other 10, who against plain evidence and direction of the Court, merely in opposition to Justice, and in compliance with those dangerous men whose opinion and practice is destructive to the Government, and that they and others may know that

Jurors fined for giving verdict in a Criminal Cause contrary to the evidence and direction of the Court.

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Fines are granted not to compound the fines in derogation of the King's Justice.

a willfull Jury cannot make an Act of Parliament or the Law of England of no effect but they are accountable and punishable for it, therefor I sett a fine of 100 marcs a peice upon every of them, and committed them to *Newgate* untill they paid their fines; and after that Court was adjourned I spake to the Sheriffe *Doe*, one of the Sheriffs of London, and told him that I understood the Sheriffs of London claimed all fines to themselves, and I did desire him that those fines should not be abated or compounded without my knowledge, and in case they were I told him they must expect to answer an Information in the King's Bench for abusing the King's grace and rendring the King's Justice contemptible, and in overthrow of the Government and to the encouragement of offenders of that nature, and that thereupon they must expect to have that Grant of the fines to be forejudged and never to be [mixed?] with that they had so much abused (*Vide ante*, page 54). [And I then stated] that in criminal cases the Court may fine a Jury who will give a verdict contrary to their evidence; and the reason (as I take it) is that otherwise a headstrong Jury might overthrow all the course of Justice, for no attaint lyeth in criminal Causes, and also one Verdict is peremptory, and a new tryall cannot be granted in criminall causes, and therefore the Judges have always punished such willfull Juries by fine and imprisonment and binding them to their good behaviour. But in civil causes betwixt man and man, if a Jury give a verdict contrary to their evidence there the Court cannot fine them, because there is other sufficient remedy by attaint or on Certificate of the Judge by granting a new tryall; and this was agreed by most of the Judges in Serjeants Inne in
Chancery

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Chancery Lane, about one year since, where my Lord Chief Justice *Hide*, in *Oxford* Circuit, had fined a Jury in a civil cause for going contrary to their evidence and his direction, being the Judge of the Assize in that place. But though in civil cases the Jury is not fineable for giving a verdict contrary to their evidence, for the reasons aforesaid, yett for their miscarriage in civil causes Jurymen are fineable, as the book cited (ante, page 54) proves, viz. 8 *Aff. Pl.* 35, a juror fined because he could not agree with his companions, but kept them together a day and a night without good cause, although at last he did agree with them; and *Dr. and Stu.* 18 *Edit. cap.* 52, 271, in Civil Causes if a Jury will not agree the Court may fine them, so if they will eat and drinke without leave of the Court before they have given their verdict (note the whole case of the Quakers as to fining Jury, now not law).

Jurors in Civil Cases.
In what cases fineable.

At the same Sessions Mr. *Martin Gardner*, and other Officers and their Soldiers, to the number of Nineteen, were indicted for breaking open the House of *Jonathan Hutchinson* near *Cheapside* in the Day time, and putting him in fear, &c. and stealing away several Goods, and upon the Evidence, the Case was that the Lord *Arlington*, the King's Secretary, by Order from the King made a Warrant to apprehend certain Persons named in the Warrant being dangerous Persons; and this Warrant was directed to one of the King's Messengers, and he having Notice that those Persons named in the Warrant were at a meeting in *Hutchinson's* House, desired those Soldiers to assist him in the taking of them, whereupon they came to the House, and broke open the Door, and apprehended some of them, but in the doing of it, some of the common Soldiers without the Knowledge of their

Gardner's Case.
Soldiers breaking open Houses by Warrant to search, &c.
Tremaine 355.

their Officers, and against their command took away [47] a Cloak, and some small Things out of the House, but the Witnesses could not tell which of the Soldiers they were, but said, my Lord *Mayor* who took the Examinations could fit them upon the Persons; and my Lord *Mayor* being now absent, upon Occasion of the Death of Sir *Thomas Vyner*, who died this Morning, I conceiving it necessary to say something to satisfy the Citizens and others standing by, did to this Effect declare the Law, That if several Persons come into a House together with an intent to steal, if but one of them steal Goods, they are all equally guilty. 2. That this Warrant now produced was not sufficient to justify the breaking open the Doors of the House, and Soldiers ought not on any Pretence to break open Houses unless they have with them a Civil Officer, as Justice of the Peace, or Constable. 3. That if Persons have a Warrant to apprehend any one, and they in order to execute the Warrant break open a Door, and mistake the Law in that Point; this breaking of the Door maketh them Trespassers, but can never be interpreted to make them guilty of Felony; for their Design was not to commit Felony, and there must be always a felonious Intent to make a Felony. 4. If after a Door broken with intent to apprehend a Person, any of the Company take away any of the Goods from the House, this is Felony in the Person that did it, and in none of the Rest; unless it can be proved that any of the Rest were assenting to the taking of the Goods, and then it is Felony in as many as consented; and after this done, by reason the Evidence could not be made out without the Examinations taken by my Lord *Mayor* and he was absent, therefore I discharged the Jury of them, and ordered Bail
to

Where the
breaking open
a House Felony,
and where not.
1 Hawk. 136.
2 Hawk. 438.
By Colour of a
Warrant.
2 Hawk. 439,
440.

Ante 31, and
Post 83.
2 H. P. C. 295.
Sed Vide Foff.
16, 39, 76,
328.

to be taken of them to appear the next Goal-delivery.¹

Vide, This Book before, concerning Restitution of stolen Goods to the Prosecutor. If upon his Evidence, or Evidence proved by him, the Thief be convicted, I have made a great inquiry, and find that my Brother *Wylde* was in the Right, for the Words of the *Stat. of 21 H. 8. C. 11.* are general, that where the Thief is convicted at the Prosecution of the Party robbed, there the Party robbed shall have Restitution, and taketh no Notice whether the Goods be sold in a Market Overt, or not; so by that Statute the Common Law is altered as to that Point. And for the *Stat. of 31 Eliz. Cap. 12.* concerning Horses stolen; and sold in a Market Overt, the Owner may have them again if he make claim within six Months, and pay the Buyer what he paid *bona fide*, that is nothing to this Case. For that Statute giveth that kind of Restitution as to Horses, altho' there be no Prosecution. And for the Bishop of *Worcester's* Case, 'tis true, the Inference of the Book is as it is there said; but the main Point was not there in Question, altho' in those Times there was a doubtful Opinion what the Law was; and I spake with Mr. *Lee*, a very good Clerk, who hath attended the Sessions at the *Old Bailey* above forty Years; and I asked him how the Practice there was, and he told me it was doubted till about 4 & 5 *Car. 1.* And then Justice *Jones*, and several other Judges advised about it, and did resolve that

Ante 54.

2 Hawk. 241.

Moore 360.

¹ Discharging the Jury of Offenders, seems all through this Book, to have been the Practice in the Time of Kelyng; see the Cases in the Margin; but see the contrary are the Rules then referred to.

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*Vide Co. sur
Magna Charta,
p. 714. accord.
notwithstanding
a Sale in a Mar-
ket Overt, in
Case of an Ap-
peal at Com-
mon Law;
And Stat. 21
H. 8. saith that
Restitution
shall be made in
case the Thief
be convicted at
the Prosecution
of him who lost
the Goods as
in the Case of
an Appeal at
Common Law.*

Where restitu-
tion and where
not.

that the Party who lost the Goods and prosecuted the Felon to Conviction should have Restitution of his Goods which were stolen, notwithstanding they were sold in a Market Overt, and ever since that Time he says the Practice hath been accordingly. And if any one plead to a Writ of Restitution in such a Case, that he bought the Goods in a Market Overt; ever since the Resolution the other Party presently demurred unto it, and had Judgment: And I think it to be a very good Resolution warranted by the Words of the *Stat. of 21 H. 8.* and tends to the advancement of Justice to make Men prosecute Felons, and it will discourage Persons from buying stolen Goods, tho' in a Market Overt; for under that pretence Men buy Goods there for a small Value of Persons whom they have reason to suspect, which Practice this Resolution will abate.

Coke's Magna Charta is express in Point, that upon the *Stat. of 21 H. 8.* the Owner who Prosecutes shall have Restitution, notwithstanding a Sale in Market Overt. *Note,* If Goods be stolen, and not waived in flight, nor seized by some of the King's Officers, as suspected to be stolen, there the Party that is robbed may take his Goods again, or bring an Action for them, altho' he doth not Prosecute. *Vide Co. 5. Rep. Foxley's Case* 109. *Stamford Pl. Coron.* 186. *b.* But if the Goods be waived by the Felon in his Flight or in Case they be not waived, yet if they be seized by any of the King's Officers as suspecting them to be stolen, there the Party shall not have Restitution, unless the Thief be convicted at his Prosecution, *Vide Stamford, Pl. Cor.* 186. *b.* And in such Cases the Party shall have Restitution only for such Goods as are expressed in the indictment, and not for any other Goods

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Goods tho' stolen at the same time, if they are omitted out of the indictment, because by that omission the Thief might have escaped, *Co. 5. Rep. Foxley's Case* 110. *Vide* for these matters *Stamford, Pl. Cor. Title, Fresh Sute*, 165. and *Title Wagst* 186. and *the same Book Title*.¹

² Hawk. 239
et seq.

The Question, whether at this day there needs two Witnesses to convict a man of High Treason, hath grown only upon the Opinion of *Co. Pl. Cor.* 25, 26. where amongst other things, he delivers an Opinion that at the Common Law, two Witnesses are needful in Cases of Treason, and cites many Books in the Margin; but none of them warrant any such Opinion; and there are many things in his Posthumous Works, especially in his Pleas of the Crown concerning Treasons, and in his Jurisdiction of the Courts concerning Parliaments, which lie under a Suspicion, whether they received no Alteration, they coming out in the time of that which is called the *Long Parliament*, in the time of that desperate Rebellion against *King Charles* the first. But certain it is, there are many Errors in those places; but as to the main Question, it seemeth to me very plain by the express Words of the *Stat. of 1 E. 6. c. 12.* that at the Common Law one Witness was sufficient in High Treason. For the Words of the *Stat.* are, no Person after the first day of *February*, then next coming, should be indicted, convicted, &c. for any Offence of Treason, &c. Unless such Offender be accused by Two sufficient Witnesses, which proveth strongly, as I think, that before that time one Witness was enough, and, in all Cases at Common Law, Proof by one Witness is sufficient, and no authority

One Witness is enough in Treason, as it seemeth to me.
² H. P. C. 287.
² Hawk. 590, 596.

¹ Title Appeals. St. Pl. Cor. 66, as I believe.

authority, that I can find, in any Book is otherwise, so that I take the necessity of two Witnesses was induced by the *Stat. in 1 E. 6.* and then the Force of that Statute is taken away by the *1 & 2 Ph. & Ma. cap. 10.* which altho' it were in the general a Law which expired with that Queen, being made for preservation of her Person, yet that Clause in that Statute, that Trials for Treasons shall be according to the course of Common Law, is a perpetual Clause, and restoreth the Common Law as it was before the *Stat. 1 of E. 6.* and the *Stat. 1 & 2 Phil. & Ma. cap. 11.* which is the next Chapter concerning Treasons, in counterfeiting Monies, faith, that the Offenders shall be indicted, convicted, and attainted by such like Evidence, and in such manner as they might have been before the first Year of the late *K. E. 6.* which points expressly to the time when two Witnesses were required, and which by this Statute appeared not to be at the Common Law.¹ [50]

*Vid. Stat. 1.
Jac. c. 21.*

Sale to Brokers
not alter the
Property.

That *Brokers*, as they are now used for taking to pawn or buying of Apparel, Bedding, Plate, Jewels, &c. is an unlawful Trade, and enacted, that no Sale to such Persons in *London, Westminster, Southwark*, or within two miles thereof, alters any property; and that if they refuse to shew any such Goods so pawned or sold, they forfeit the double value: and so there is a difference betwixt the ancient *Brokers* and these new *Brokers*, so that by the Statute if any stolen Goods be bought by them, the party may have his Action against them for the Goods, whether he

¹ But this Doubt is removed by Statute 7 W. 3. C. 3. Vide Foster 1 Disc. on H. T. Cap. 3. p. 221. 2. Ed.

he prosecute the Felon or no, for the property remains to the Owner, notwithstanding such sale.¹

Memorandum, at Lent Circuit at Winchester, 18 Car. 2. One Henry Hood was indicted for the Murder of John Newen, and upon the Evidence it appeared, that he killed him without any provocation, and thereupon I directed the Jury, that it was Murder; for the Law in that Case intended malice; and I told them they were judges of the matter of fact, viz. whether Newen died by the hand of Hood; but whether it was Murder or Manslaughter, that was matter in Law,² in which they were to observe the direction of the Court. But notwithstanding they would find it only Manslaughter; whereupon I took the Verdict, and fined the Jury, of which John Goldwier was the Foreman, 5*l.* a piece, and committed them to Goal till they found Sureties to appear at the next Assizes, and in the mean time to be of the good Behaviour: but after, upon the Petition of the Jurors, I took down their fines to 40*s.* a piece,

Hood's Case. Jurors fined for finding Manslaughter contrary to direction of the Court. See before, Page 54. This course of fining was used in those Days, but since condemned, and never since used barely for giving a Verdict contrary to Evidence.

[51] appear at the next Assizes, and in the mean time to be of the good Behaviour: but after, upon the Petition of the Jurors, I took down their fines to 40*s.* a

¹ But cost to Pawnbrokers in Great Britain. Vide 30 Geo. 2. Cap. 24. and 24 Geo. 3. Sess. 2. c. 42.

² This seems to have been a wrong direction, because the circumstance of provocation is as much a matter of fact, and to be collected from the testimony of the witnesses as the giving the mortal wound. Probably in this case there was some provocation which the jury thought a sufficient one to excite the prisoner's sudden resentment and put him off his guard, and thereby entitle him to the benefit of clergy, but which the judge did not think sufficient for that purpose. The existence of a provocation is certainly a matter of fact to be proved by evidence and found by the jury. The sufficiency of a provocation that is proved by evidence to exculpate the prisoner from the charge of murder of malice aforethought, may perhaps be a matter of law. See below, page 88, lines 10, 11, and 12, the 8th resolution of the judges in *Lord Morley's Case*.

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piece, which they all paid, and entered in Recognizance, &c.¹

The Ordinary, or Bishop's Clerk, fined, for saying the Prisoner did read when he could not, for endeavouring to abuse the Court.

2 Hawk. 501.

Ante 40.

2 H. P. C. 380.
381.

2 Hawk. 500.
501.

Mr. Ford's Case.
Killing a Man in defence of his own Possession of a Room in a Tavern justifiable.

At the same Assizes at *Winchester*, the Clerk appointed by the Bishop to give Clergy to the Prisoners, being to give it to an old Thief; I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the Book to him, and I perceived the Prisoner never looked upon the Book at all, and yet the Bishop's Clerk, upon the demand of *legit* or *non legit*, answered *legit*; and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the Clerk of the Assizes ask him again, *legit* or *non legit*; and he answered again something angrily, *legit*: Then I bid the Clerk of the Assizes not to record it, and I told the Parson he was not the Judge whether he read or no, but a Ministerial Officer to make a true Report to the Court. And so I caused the Prisoner to be brought near, and delivered him the Book, and then the Prisoner confessed he could not read; whereupon I told the Parson he had reproached his Function, and unpreached more that day than he could preach up again in many daies; and because it was his personal Offence and Misdemeanor, I fined him 5 *Marks*, and did not fine the Bishop, as in case he had failed to provide an Ordinary.

My Brother *Archer*, upon discourse, told me he well remembered the Case of *Mr. Ford*, a *Gent.* in *Grays Inn*, who in the time when *Sir Nich. Hyde* was Chief Justice, was indicted of Murder in the King's Bench, and upon the Evidence, the case was that *Mr. Ford* with other Company, was in the *Vine Tavern*

¹ But see *Bushel's Case*. Vaughan 135, and 2 Hawk. 215.

Tavern in Halborn, in a Room, and some other Company, bringing with them some Women of ill Fame, would needs have the Room where Mr. Ford was, and turn him out, to which Mr. Ford answered, that if they had civilly desired it, they might have had it, but he would not be turned out by force, and thereupon they drew their Swords on Mr. Ford and his Company, and Mr. Ford, drew his Sword, killed one of them, and it was adjudged justifiable.

[52] At the Goal-delivery in the *Old Baily*, 19 February 1665, *John Jones* and *Philip Bever*, were indicted for Burglary for breaking the King's House at *Whitehal*, and stealing from thence the Goods of the Lord Cornbury, and were found not Guilty; and after were indicted for the same Burglary, and stealing the Goods of *Mr. Nunnefy*: and we agreed that they being once acquitted for the Burglary, could not be indicted again for the same Burglary, but might be indicted for stealing the Goods of *Mr. Nunnefy* according as it was formerly resolved in *Turner's Case*. *Vide ante.*¹ But in this case when we saw the Evidence not sufficient to prove the stealing of my Lord Cornbury's Goods, we might have discharged the Jury and so taken no Verdict; and then he might have been indicted for that Burglary, and stealing the Goods of *Mr. Nunnefy*.

Memorandum, *Mr. Lee*, the Clerk of the Peace for *London*, then told me, that about twenty Years since in the Case of *Mr. Gardiner*, who was a Citizen, and had a House in the City where he usually lived in the Winter, and another House in the Country where he usually lived in Summer; and while

1 Hawk. 84.
1 Hawk. 98.
Prin. P. L. 225.
Vide *Mawgridge's Case*,
Post.
Holt 424.
9 St. Tr. 61.
Memorand.
To inquire of
this Case.¹

*Jones' and
Bever's Case.*
1 Hawk. 133,
210.
2 Hawk. 519.
Ante 33.

2 Hawk. 495.

2 Hawk. 519.
2 H. P. C. 295.
Ante 31 & 76.
And References
ibid.
Fost. contra, 30.

Burglary,
Country House
and City House.
1 Hawk. 133.
Burglary may
be committed
in a dwelling
house, though
there be no

¹ This Case continues to be doubted, whether it be Law.
Vide Foster in notis 274.

² Page 43.

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person in the
house at the
time of com-
mitting it.

while he and his Family were in the Country, his house in the City was broken open in the Night, and his Goods stolen; no Person being in the House, and it was adjudged Burglary, for it was his Mansion House.

Foet. 68.

2 Hawk. 440.
Principals in
Murder, tho'
absent.
Foet. 349.

Memorandum, That my Brother *Twisden* shewed me a Report which he had of a Charge given by Justice *Jones* to the Grand Jury at the King's-Bench-Barr in *Michaelmas Term*, 9 *Car.* 1. In which he said, that Poisoning another was Murder at Common Law. And the Statute of 1 *E.* 6.¹ was but declaratory of the Common Law, and an Affirmation of it. He cited *Vaux* and *Ridley's* Case. If one drinks Poison by the Provocation or Persuasion of another, and dieth of it, this is Murder in the Person that persuaded it. And he took this difference: if *A.* give Poison to *J. S.* to give to *J. D.* and *J. S.* knowing it to be Poison, give it to *J. D.* who taketh it in the absence of *J. S.* and dieth of it. In this Case *J. S.* who gave it to *J. D.* is Principal. And *A.* who gave the Poison to *J. S.* and was absent when it was taken, is but accessory before the Fact: But if *A.* buyeth Poison for *J. S.* and *J. S.* in the absence of *A.* taketh it, and dieth of it; in this case *A.* though he be absent, yet he is Principal: so it is if *A.* giveth Poison to *B.* to give unto *C.* and *B.* not knowing it to be Poison, but believing it to be a good Medicine, giveth it to *C.* who dieth of it; in this case *A.* who is absent is Principal, or else a Man should be murdered and there should be no Principal: for *B.* who knew nothing of the Poison, is in no fault, tho' he gave it to *C.* So if *A.* puts a Sword

[53]

2 Hawk. 440.
Person absent
Principal in

¹ See an Account of the Reasons of this Act, Foet. 68, 69, 70.

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Sword into the hand of a Mad Man, and bids him kill *B.* with it, and then *A.* goeth away, and the Mad Man kills *B.* with the Sword as *A.* commanded him, this is Murder in *A.* tho' absent, and he is Principal: for it is no Crime in the Mad Man who did the Fact, by reason of his Madness, and he said that this Case was lately before himself and Baron *Trevor* at the Assizes at *Hereford*. A Woman after she had two Daughters by her Husband Eloped from him, and lived with another Man. And afterwards one of her Daughters came to her, and she asked her "how doth your Father," to which her Daughter answered, "that he had a Cold," to which his Wife replied, "here is a good Powder for him, give it him in his Posset;" and on this the Daughter carried home the Powder, and told all this that her Mother had said to her, to her other Sister, who in her absence gave the Powder to her Father in his Posset, of which he died. And he said, that upon Conference with all the Judges, it was resolved that the Wife was Principal in the Murder, and also the Man with whom she run away, he being proved to be advising in the Poison; but the two Daughters were in no Fault, they both being ignorant of the Poison, and accordingly the Man was Hang'd, and the Mother Burnt.

Memorandum, that upon Saturday the 28 of April 1666 *An. 18 Car. 2.* All the Judges of *England*, viz. Myself, *J. K.* Lord Chief Justice of the King's Bench; *Sir Or. Bridgeman*, Lord Chief Justice of the Common Pleas, *Sir Matthew Hales*, Chief Baron of the Exchequer, my Brother *Atkins*, Brother *Twisden*, Brother *Tyrell*, Brother *Turner*, Brother *Browne*, Brother *Windham*, Brother *Archer*, Brother *Raynsford*, and Brother *Morton*, met together at *Serjeant's*

Murder, where the Person who did the Fact is not guilty, because of Mad-ness.

1 Hawk. 4.
Dalt. 359, 338
or 533.
1 H. P. C. 617.

Persons absent
Principal in
Murder.

2 Hawk. 440.
Fost. 349.

Resolutions of
all the Judges,
on Occasion of
the Trial of
Lord *Morly*.
18 Car. 2.
2 Hawk. 586.
1 Lev. 180.
1 Sid. 277.
1 Keb. 896.
2 Keb. 19.
7 St. Tr. 421.
S. C.

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Vide Moor's Rep. 621, resolved by all the Judges, that on a Tryal by Peers the Prisoner cannot challenge any of the Peers that are returned on his Jury. Habit of the Judges at the Tryal.

If Advice asked in private of the Judges by the Peers.
2 Hawk. 586.

Serjeant's Inn in Fleet-street, to consider of such things as might in point of Law, fall out in the Trial of the Lord *Morly*, who was on Monday to be tryed by his Peers for a Murder, and we did all *and voce* resolve the several things following, *part 1.* First it was agreed that upon the Letter of the Lord High Steward directed to us, we were to attend at the Tryal in our Scarlet Robes, and the Chief Judges in their Collars of *ss.* which I did accordingly; but my Lord *Bridgman* was absent, being suddenly taken with the Gout, the Chief Baron had not his Collar of *ss.* having left it behind him in the Country; but we all were in Scarlet, but no body then had a Collar of *ss.* but myself, for the Reasons aforesaid. [54]

2. It was resolved, that in case the Peers who are Tryers after the Evidence given, and the Prisoner withdrawn, and they gone to consult of their Verdict, should desire to speak with any of the Judges to have their Opinion upon any point of Law, that if the Lord Steward spoke to us to go, we should go to them; but when the Lords asked us any Question, we should not deliver any Opinion, but let them know we were not to deliver any private Opinion without conference with the rest of the Judges, and that to be done openly in Court: and this, notwithstanding the President in the Case of the Earl of *Castlehaven*,¹ was thought prudent in regard of ourselves, as well as for the avoiding Suspicion, which might grow by private Opinions, all Resolutions of Judges being always done in Publick.

3. Although we were not all agreed in the President of the Lord *Dacre's* Case, cited by *Sir E. Coke* in

¹ 1 St. Trials 394. 2 Rush. p. 2. f. 101.

in the Pleas of the Crown, p. 29, & 30. that the Judges may deliver any Opinion in open Court, in the absence of the Prisoner; yet it was agreed, that if the Lord Steward should, in open Court, demand any of our Opinions in any thing, tho' in the absence of the Prisoner, we were to give an Answer to the Question the Lord High Steward should demand of us, we being call'd to assist the Court, and the demand of any Question in such case being referred to the Discretion of the High Steward.

If asked in Court by the High Steward in absence of Prisoner.

[55] 4. It was resolved by us all, that in case any of the Witnesses which were examined before the Coroner, were dead or unable to Travel, and Oath made thereof, that then the examinations of such Witnesses, so dead or unable to Travel might be read, the Coroner first making Oath that such Examinations are the same which he took upon Oath, without any Addition or Alteration whatsoever.

Witnesses examined by the Coroner, dead or not able to Travel.
2 Hawk. 592.
Sum. 262, 263.

5. That in case Oath should be made that any Witness who had been examined by the Coroner, and was then absent, was detained by the means or procurement of the Prisoner, and the Opinion of the Judges asked whether such Examination might be read, we should answer, that if their Lordships were satisfied by the Evidence they had heard, that the Witness was detained by means or procurement of the Prisoner, then the Examination might be read, but whether he was detained by the Means or Procurement of the Prisoner, was matter of Fact, of which we were not Judges, but their Lordships.

Witnesses detained by procurement of Prisoner.
2 Hawk. 592.
2 Keb. 13 or 19.

6. Agreed, that if a Witness who was examined by the Coroner be absent, and Oath is made that they have used all their Endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such Examination.

Witness sought for and not found.
2 Hawk. 593.

7. Agreed

Words only, no Provocation to lessen the Offence of killing a Man from Murder to be Manslaughter. 1 Hawk. 98. 1 H. P. C. 456. Fost. 290.

Vide Crompton's Just. 23, a, b. Two to play at Tables and fall out suddenly, and one with a Dagger kill the other. 1 Hawk. 89. Fost. 298.

7. Agreed, that no words, be they what they will, are in Law such a Provocation, as if a Man kill another for words only will diminish the Offence of killing a Man from Murder to be Manslaughter: as suppose one call another son of a Whore, or give him the Lie, and thereupon he to whom the words are given, kill the other, this is Murder. But if upon ill words, both the Parties suddainly Fight, and one kill the other, this is but Manslaughter, for it is a combat betwixt two upon a suddain heat, which is the legal description of Manslaughter; and we were all of Opinion that the Statute of 1 Jac. for Stabbing a Man not having first struck, nor having any Weapon drawn, was only a Declaration of the Common Law, and made to prevent the inconveniencies of Juries, who were apt to believe that to be a Provocation to extenuate a Murder, which in Law was not.

If there be a Quarrel, and a reasonable Time before they Fight, it is Murder. 1 Hawk. 96. *V. Crompt.* *Just.* 23. Two fall out suddainly and Fight presently, and one kill the other it is but Manslaughter; so if after they have quarrelled, they presently go into the Field and Fight, and one kills the other, 'tis but Manslaughter; For all is one continued Act of Fury. But if two fall out suddainly, and before any blows presently appoint to go to the Field and Fight, and one kill the other, this is Murder, because it appeareth by choosing a fit place to fight, their Reason was above their Passion, and so a deliberate Act. *Vide Crompt. Just.* p. 25. accordant.

8. Agreed, that if upon words two Men grow to Anger, and afterwards they suppress that Anger, and then fall into other Discourses, or have other Diversions for such a space of time as in reasonable intendment, their heat might be cooled, and some time after they draw one upon another, and Fight, and one is killed, this is Murder, because being attended with such Circumstances as it is reasonably supposed to be a deliberate Act, and a premeditated Revenge upon the first Quarrel; but the Circumstances of such an Act being matter of Fact, the Jury are Judges of those Circumstances. [56]

This

Murder and other Offences. 89

This following Report I took out of Justice Spelman's Original Reports, which I had from Sir Jeffry Palmer Attorney General, which Report is cited, Co. Pl. Cor. 29 & 30.

The Lord Dacres's Case, who was indicted for Treason before Commissioners of Oyer and Terminer in the County of Cumberland, for adhering to the Scots, the King's Enemies, and tried by his Peers 26 H. 8. Thomas Duke of Norfolk being High Steward; and the day before all the Judges assembled to resolve certain Questions which might arise upon the said Tryal, so that if any Question should be asked them, they might resolve *una voce*, and one Question was, whether the Prisoner might waive his Tryal by his Peers, and be tried by the Country; and they all agreed he could not. For the Statute of *Magna Charta* is in the Negative, *Nec super eum ibimus nisi per legale iudicium parium suorum*, this is at the King's Suit upon an Indictment.

2. It was agreed by most of the Judges, that if all the Peers do not agree in their Verdict, then the Verdict of the greatest part of them is a good Verdict, so that there be Twelve or more; (therefore the use is never to have less than twenty three Peers for Tryers, because that is the least number to be sure of twelve to be of one Mind)¹. And after the Prisoner was arraigned, and asked whether he was Guilty or not Guilty: he desired respite to consider, because the indictment was long, and contained many things; but the High Steward told him, he must plead to the Treason, or else Judgment would be given against him as a Traitor, and thereupon he pleaded

The Lord Dacres' case.

26 Hen. 8.

11 St. Tr. 10.

2 Hawk. 6.

A Peer cannot waive his Tryal by Peers. 2 Hawk. 585.

Verdict of the greatest number, good if twelve. Fost. 247.

2 Hawk. 458.

Sum. 226.

2 H. P. C. 317.

¹ *Memo.* This parenthesis is not my own (Sir John Kelyng), not taken out of that report.

Skinner, 145.
 Savile, 56.
 Dyer, 205.
 1 Inst. 177.
 Co. Lit. 391.
 3 Inst. 14, 30.
 S. P. C. 150.
 2 Hawk. 585.

The High
 Steward not to
 speak to the
 Peers in the
 Absence of the
 Prisoner.
 2 Hawk. 585.
 3 Inst. 22, 30.
 2 Inst. 49.

Court may be
 adjourned.
 2 Hawk. 22.

If the Lords

pleaded not Guilty. When he was asked how he would be tried, and he took long time to consider, and would not have put himself upon his Peers; but at last the High Steward told him that he must give Judgment against him as a Traitor, unless he put himself upon his Peers, as against one who refused the Tryal of Law; and thereupon he put himself for his Tryal upon his Peers; and after Evidence was given, and the Prisoner withdrawn from the Bar, and the Lords gone to consider of their Verdict, they sent to the Lord Steward to speak with him; and he thereupon desired the advice of the Judges; and they advised him that he could not do so unless the Prisoner was present at the Bar. And afterwards the Peers desired the Lord Steward that one *Christopher Dacres*, Uncle to the Lord *Dacres*, who was in the *Tower* for the same Treason, might be sent for to be examined, if the *L. Dacres* did command him to go to the Lord *Maxie* to treat with him in favour of the *Scots*: and the Lord *Steward*, by the advice of the Judges, told them, that could not be done, all the Evidence being given already, and also he was not a necessary Witness, being Uncle to the Prisoner, and not supposed that he would give Evidence against him, so after, in the absence of the Prisoner (as the Course is) the Lords gave the Verdict, and found him not Guilty, and then the Prisoner was brought to the Bar, and the Lord *Steward* did rehearse the Verdict, and gave Judgment that he should be discharged paying his Fees.

And amongst the Judges, a Question was moved whether the Court might be adjourned to the next day, and they agreed it might, but it hath not been done.

Another Question was moved among them, that if
 the

the Peers did not agree, so that the Court was adjourned till the next day, what should be done with the Peers who were the Tryers? And some Judges held they were to be kept together all night, but others held, because they were not sworn, for the great Trust reposed in them, and presumed to be in them, they might go to their own Houses every one by himself.

agree not of their Verdict that Day whether to be kept together, or go to their several Houses.
2 Hawk. 586.
And Cases ibi.

[58] Another Question was moved among them, whether the Lords who were Commissioners, to enquire of the Treason, before whom the Prisoner was indicted, upon the Commission of *Oyer and Terminer*, might be Peers on the Tryal; and agreed by all that they might.

Lords before whom the Indictment is found, may be Peers on the Tryal.
End of Report of Lord Dacre's Case.

If *A.* hath Malice against *B.* and meeteth him and striketh him, and then *B.* draweth at *A.* and *A.* flyeth back until he come to a Wall, and then kills *B.* this is Murder, notwithstanding his flying to the Wall; for the craft of flying shall not excuse the Malice which he had, nor shall any such Device to wreak his Malice on another, and think to be excused by Law, avail him any thing, but in such Case the Malice is enquirable, and, if that be found by the Jury, then his flight is so far from excusing the Crime, that it aggravates it, *vide Cramp. Just. 22. b. Fitz. Cor. 287. vide at the end of that Case, in Fitz. Abridgment, Coron. 287.* the Jurors were amerced for putting an under Value upon the Goods of a man who killed another in his own defence.¹

1 Hawk. 97.

Murder notwithstanding flying to a Wall.
Fost. 278.

Jury undervalue Goods forfeited, they are amerciable.

At

¹ As this is cited, it might be imagined that in every Case of Homicide, *se defendendo*, a Man forfeited all his Goods, otherwise, why was the Jury charged with the Value of them, or amerced for their Misbehaviour, with regard to the Appraisment? But Fitzherbert goeth farther into the true State of the Case: The Defendant after he killed the Assailant fled

*Johnson, Gir-
ling, and
Powell's Case.*
Procuring ad-
mission into a
House with a
design to rob it,
and then break-
ing open a
trunk and
taking money
out of it, is not
a breaking of
the House so as
to take away
the benefit of
Clergy.

What shall be
a breaking of a
House to take
away Clergy.
2 Hawk. 495.
Vide Fost. 103,
109.

At a Goal Delivery at *Newgate*, 11th July 18
*Car. 2. Tho. Johnson, John Girling, and Elizabeth
Powell* were indicted for breaking the House of
Thomas Powell (his Wife then being in the house)
and stealing away above 60*l.* in Money. Upon the
Evidence the Case was, that *Powell* kept an *Al-
house*, and *Eliz. Powell* was his Servant, and had
seen her Mistress put Money into a Trunk in her
Chamber (which was 2 pair of Stairs high), and lock
her Trunk; and this Servant combined with the two
Men to Rob her of the Money, and in order there-
unto, those two Men came into the House to Drink,
and found fault with all the Rooms below Stairs,
and so were had up two pair of Stairs, the next
Chamber to that where the Money was; and the
Maid came to them, and they broke up the Trunk,
and took away above 60*l.* in Money; and upon this
Evidence, myself, and my Brother *Twisden*, and
Brother *Wylde* being present, were of Opinion that,
to take away Clergy, there must be an actual break-
ing of the House. For if one come into a Tavern,
or an *Al-house*, and take any thing, the Law maketh
them Trespassers *ab initio*; and so if they steal any
thing, it is Felony; yet this doth not make an ac-
tual breaking of the House; but in that Case, if
they being in the House break open any Chamber-
door and steal Goods, this is an actual breaking of
the House, and taketh away Clergy; but the break-
ing open a Trunk or Box which is locked, and
stealing any thing out of it, is no actual breaking of
the House, because the Trunk or Box are no part of
the House. But if they break open any thing which
is

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for it. Ideo, saith the Book, *Catalla ejus confiscantur profuga.*
See Foster C. L. 286.

Murder and other Offences. 93

is fixed to the Free-hold, as a Cupboard Door in a Wall, &c. this is an actual breaking of the House ; and accordingly in the principal Case, the Men had their Clergy.

At a Goal-delivery at Newgate, 25 April, 1666. 18 Car. 2. upon an indictment of Murder against *Hopkin Huggett*,¹ a special Verdict was found to this Effect. “We find that *John Berry*, and two others with him the Day and Place in the Inquisition, had *de facto*, but without Warrant (for ought appears to us) impressed a Man whose Name is not yet known, to serve in his Majesties Service in the wars against the *Dutch Nation*; that thereupon, after the unknown man was impressed, he with the said *John Berry*, went together quietly into *Cloth-fair*; and the said *Hopkin Huggett* and three others, walking together in the *Rounds* in *Smithfield*, and seeing the said *Berry* and two others with the man impressed, going into *Cloth-fair*, instantly pursued after them, and overtaking *Berry* and the imprest man, and the two other Men, required to see their Warrant; and *Berry* shewed them a Paper, which *Hopkin Huggett* and the 3 others said was no Warrant; and immediately the said *H. Huggett* and the three others drew their Swords to rescue the said Man imprest, and did thrust at the said *John Berry*; and thereupon the said *John Berry* and the two others with him did draw their Swords and fight together, and thereupon the said *H. Huggett* did give the Wound in the Inquisition to the said *John Berry*, whereof he instantly died; and, if upon the whole matter, the said *H. Huggett* be guilty of Murder,

A Special Verdict.
Hopkin Huggett's
Case for killing
a Man.
1 Lord Raym.
143.
1 H. P. C. 465.
Fost. 138, 154,
314.

Judges differ, if
Murder or
Manlaughter.

¹ Called by Lord Raymond in his Report, *Hopping* and *Huggett's* Case.

94 *Murder and other Offences.*

Opinions of the
Judges.

1 Hawk. 103.
Cromp. 27.
Lord Raym.
1296.
Holt. 485.
Opinion of
eight Judges.

Opinion of the
other four
Judges.

Murder, they find so; If of Manslaughter they find so, &c." All the Judges of *England* being met together, at *Serjeant's-Inn* in *Fleet-street*, upon other Occasions, (and before that time, having Copies of this special Verdict sent unto them) after the other business dispatched, they were desired to give their [60] Opinions in this Case, whether they held it to be Murder or Manslaughter. And the Lord Chief Justice *Bridgman*, Lord Chief Baron *Hales*, my Brother *Atkins*, Brother *Tyrell*, Brother *Turner*, Brother *Browne*, Brother *Archer*, and Brother *Rainsford*, having had the Notes of the Special Verdict three days before, delivered their Opinion as then advised; but they said they would not be bound by it: that this was no Murder, but only Manslaughter; and they said, that if a man be unduly arrested or restrained of his Liberty by three men, altho' he be quiet himself, and do not endeavour any Rescue, yet this is a Provocation to all other men of *England*, not only his Friends but Strangers also for common Humanity sake, as my Lord *Bridgman* said, to endeavour his Rescue; and if in such endeavour of Rescue they kill any one, this is no Murder, but only Manslaughter. And my Brother *Browne* seemed to rely on a Case in *Coke* 12. *Rep.* p. 87. where divers men were playing at Bowls; and two of them fell out and quarrelled, one with another, and a third man who had no Quarrel, in revenge of his Friend struck the other with a Bowl, of which blow he died, this was held to be only Manslaughter. But myself, Brother *Twisden*, Brother *Wyndham*, and Brother *Morton*, were of another Opinion; and we held it to be a Murder, because there was (as we thought) no provocation at all. And if one man assault another without Provocation, and kill him,

him, this is Murder; the Law in that Case implying Malice. And we find it was resolved by all the Judges in the Lord *Morley's Case*, that no Words, be they what they will, were such a Provocation in Law, as, if upon them one kills another, would diminish or lessen the Offence from being Murder, to be but Manslaughter. As if one called another Son of a Whore, and giveth him the Lie, and upon those Words the other kill him that gave the Words, this notwithstanding those Words, is Murder; and we thought those Words were apter to provoke a man to kill another, than the bare seeing a man to be unduly pressed when the Party pressed willingly renders himself. But we held that such a provocation as must take off the killing of a man from Murder to be but Manslaughter, must be some open Violence, or actual striving with, or striking one another; and that answers the Case cited by my Brother *Browne*: For there it must be intended that the two men that fell out were actually fighting together; for if there passed only Words betwixt these Two, and upon them, a third Person struck one of them with a Bowl, and killed him, we held that to be Murder. And to this my Lord *Bridgman* and the other Judges agreed; and we thought the Case in question to be much the stronger, because the Party himself who was impressed was quiet, and made no Resistance, and they who meddled were no Friends of his, or Acquaintance, but were Strangers, and did not so much as desire them which had him in Custody to let him go, but presently without more ado, drew their Swords at them, and ran at them. And we thought it

*Vide Lord
Morley's Case.
Ante 88.¹*

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¹ The Principles on which this Case was ruled, are controverted by Mr. J. Foster, 315 to 318.

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It to be of dangerous Consequence to give any Encouragement to private men to take upon themselves to be the Assertors of other Men's Liberties, and to become Patrons to rescue them from Wrong; especially in a Nation where good Laws are for the Punishment of all such Injuries, and one great end of Law is to right Men by peaceable Means, and to discountenance all Endeavours to right themselves, much less other Men, by Force.

Further
opinions of the
said four Judges.
1 Hawk. 98.
Fost. 295.
Lord Raym.
1493.
2 Roll. 461.

Secondly, We four were of Opinion, that if *A.* assault *B.* without any Provocation, and draw his Sword at him, and run at him; and then *B.* to defend himself draw his Sword, and they fight together: If *A.* kill *B.* it is Murder, and *B.* drawing his Sword to defend himself shall not lessen the Offence of *A.* from being Murder, to be Manslaughter only: And to this the other Judges did (as I take it) agree. For it were unreasonable, that, if one Man draw upon another, and run at him without any Provocation, the other Man should stand still, and not defend himself, and it is also unreasonable that his endeavour to defend himself should lessen the Offence of him who set upon him without Provocation.

1 Hawk. 98.

But we four held, that if two men be quarrelling, and actually fighting together, and another Man runneth in to aid one of them and kill the other, this is but Manslaughter, because there was an actual fighting and striving with violence.

So we held, If such People who are called Spirits [62] take up a Youth, or other Person to carry him away, and thereupon there is a Tumult raised, and several Persons run in, and there is a Man killed in the Fray, this is but Manslaughter: For there is an open Affray, and actual Force, which is a sudden Provocation,

Provocation, and so that Death which ensueth is but Manlaughter. But where People are at Peace, there if another Man upon Suspicion that an Injury is done to one of them, will assault and kill him whom he thinketh did the Injury, this is Murder, so that we hold nothing but an open Affray or striving can be a Provocation to any Person to meddle with an Injury done to another, if in that meddling he kill a Man, to diminish or lessen the Offence from Murder to Manlaughter.

Memorandum, After this Difference I granted a *Certiorari* to remove the Cause into the King's Bench, to be argued there, and to receive a final and legal Determination; and altho' all the Judges of the Court were clearly of Opinion that it was Murder, yet it being in Case of Life, we did not think it prudent to give him Judgment of Death, but admitted him to his Clergy; and after he read, and was burned in the Hand, we ordered him to lie in Prison eleven Months without Bail, and afterwards until he found Sureties to be of the good Behaviour during his Life.

At the Goal Delivery in the *Old Baily*, 10 Oct. 1666. *Tho. Caffy*, and *John Cotter*, were indicted for robbing *William Pinkney*, a Goldsmith by the *Templebar*, in his House near the High-way in the Night Time, and stealing several parcels of Plate, and other Things from him. And they were also indicted for the same Offence for Burglary for breaking his House in the Night, and stealing his Plate, &c. and on both these Indictments they were arraigned and tryed, and upon the Evidence the Case appeared to be that *Cotter* was a Lodger in the House of the said *Pinkney*, and knowing that he had Plate and Money to a good Value, he combined

Caffy and *Cotter's* Case.
Ante, p. 65.

Robbery and
Burglary by
Fraud.
1 H. P. C. 552.

Vide *Cok. Pl.*
Cor. 64. pre-
tence of *Huy*
and *Cry*.

1 Hawk. 131.
And Cases
cited, *ibid.*

with the aforeſaid *Caffy*, and one *John Harrington*, and *Gerrard Cleaſhard*, and they three contrived that one of thoſe three ſhould come as Servant of the other to hire Lodgings there, for his Maſter and another Gentleman; and *Cotter* told them, that *Pinkney* was one who conſtantly kept Prayers every Night, and they could not have ſo good an Opportunity to ſurprize him as to deſire to join in Prayer with him, and at that time to fall on him and his Maid, there being then no other Company in the Houſe; and accordingly one of them came on *Saturday* in the Afternoon, and hired Lodgings there, pretending it to be for his Maſter and another Gentleman of good Quality, and about eight o'Clock at night, they all came thither, two of them being in very good Habit, and when they were in their Chamber they ſent for Ale, and deſired *Pinkney* to drink with them, which he did; and while they were drinking, *Cotter* came in to his Lodging, and they hearing one go up Stairs, aſked who it was, and *Pinkney* told them it was an honeſt Gentleman, one Mr. *Cotter*, who lodged in his Houſe, and they deſired to be acquainted with him, and that he might be deſired to come to them; and thereupon *Pinkney* ſent his Maid to him to let him know the Gentlemen deſired to be acquainted with him, to which *Cotter* ſent word it was late, the next day was the Sabbath, and he deſired to be private, and thereupon thoſe Perſons told *Pinkney* they had heard he was a Religious Man, and uſed to perform Family Duties, in which they deſired to join with him. At which *Pinkney* was very well pleaſed that he had got ſuch Religious Perſons, and ſo called to Prayers, and while he was at his Devotion they roſe up, and bound him and his Servant, and then *Cotter* came to them, and ſhewed them

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them where his Money and Plate lay, and they ransacked the House, and broke open several Doors and Cupboards fixt to the House, and upon this Evidence, myself, my Brother *Wylde*, Recorder, and Mr. *Howell*, Deputy Recorder, being all who were there present of the Long Robe, were of Opinion that the Entrance into his House being gained by Fraud, with an intent to rob, and they making use of this Entrance, thus fraudulently obtained as in the Night Time to break open Doors, &c. this was Burglary, agreeable to the Case of *Farr* in this Book, and the Case of Mr. *Lemott*, in this Book, and accordingly they were found guilty, and had Judgment, and were executed.

Ante, 65.
Ante, 64.

[64]

At the same Sessions *John Grey* being indicted for the Murder of *William Golding*, the Jury found a special Verdict to this Effect, viz. We find that the Day, Year, and Place in the Indictment mentioned, *John Grey*, the Prisoner was a *Blacksmith*, and that *William Golding*, the Person killed was his Servant, and that *Grey*, his Master, commanded him to mend certain Stamps, being Part belonging to his Trade, which he neglected to do; and the said *Grey*, his Master, after coming in asked him the said *Golding*, why he had not done it, and then the said *Grey* told the said *Golding*, that if he would not serve him, he should serve in *Bridewel*, to which the said *Golding* replied, that he had as good serve in *Bridewel* as serve the said *Grey* his Master; whereupon the said *Grey*, without any other Provocation, struck the said *Golding* with a Bar of Iron, which the said *Grey* then had in his Hand, upon which he and *Golding* were working at the *Anvil*, and with the said blow he broke his Skull, of which he died; and if this be Murder, &c. This Case was found specially by the Desire

Grey's Case
for killing his
Apprentice.
Post. 133, (old
paging).
1 H. P. C. 454,
474.
Fost. 262.

100 *Murder and other Offences.*

Vide Dalton
Just. 278, 330;¹
a case cited be-
fore Justice
Walmsby, 43 El.
At *Stafford*
Assizes, where
on Words
'twixt Husband
and Wife, he
suddenly
struck her
with a Pestle
and killed her,
and it was
adjudged Mur-
der; yet a Hus-
band by Law
may correct,
but the Pestle
was not an In-
strument to
correct withal.²
1 H. P. C. 457.
473.
Crompt. 25.

Desire of my Brother *Wylde*, and I shewed the special Verdict to all my Brethren, Judges of the King's Bench, and to my Lord *Bridgman* Chief Justice of the Common Pleas. And we were all of Opinion that this was Murder. For if a Father, Master, or School-master, will correct his Child, Servant, or Scholar, they must do it with such Things as are fit for Correction, and not with such Instruments as may probably kill them. For otherwise, under pretence of Correction, a Parent might kill his Child, or a Master his Servant, or a School-master his Scholar, and a Bar of Iron is no Instrument for Correction. It is all one as if he had run him through with a Sword; and my Brother *Morton* said he remembered a Case at *Oxford* Assizes before Justice *Jones*, then Judge of Assize, where a *Smith* being chiding with his Servant, upon some cross Answer given by his Servant, he having a piece of hot Iron in his Hand, run it into his Servant's Belly, and it was judged Murder, and the Party executed. And my Lord *Bridgman* said, that in his Circuit there was a Woman indicted for murdering her Child, and it appeared upon the Evidence, that she kicked her and stamped upon her Belly, and he judged it Murder: And my Brother *Twisden* said, he ruled such a Case formerly in *Gloucester* Circuit, for a piece [65]

¹ 218 in other Editions.

² There are various Editions of Dalton, and the Paging differs in most, this is Chap. 93, and here Dalton puts a Quære to this Case, cited in the Margin by the learned Editor, "Why it should be Murder, considering there appeareth no precedent Malice, and that it was done upon the sudden and upon Provocation?" But Dalton does not seem in this Quære to have well understood the true legal meaning of the Word *Malice*, which is well defended by Foster 256, 257, 262.

Murder and other Offences. 101

a piece of Iron or a Sword, or a great Cudgel, with which a Man probably may be slain, are not Instruments of Correction. And therefore when a Master strikes his Servant willingly with such Things as those are, if Death ensue, the Law shall judge it Malice prepensed, and therefore the Statute of 5 H. 4. c. 5. which enacts, that if any one does cut out the Tongue, or put out the Eyes of any of the King's Subjects of Malice prepensed, it shall be Felony. If a Man do cut out the Tongue of another Man voluntarily, the Law judgeth it of *Malice prepensed*. And so where one Man killeth another without any Provocation, the Law judgeth it Malice prepensed; and in the Lord *Morly's* Case in this Book, it was resolved by all the Judges, that Words are no Provocation to lessen the Offence from being Murder, if one Man kill another upon ill Words given to him. But if a Parent, Master, or Schoolmaster, correct his Child, Servant, or Scholar, with such Things as are usual and fit for Correction, and they happen to die, *Poulton de pace*, page 120.¹ saith this is by Misadventure, and cites for Authority, *Kelloway* 108, *a*, *b*, & 136, *a*. But that Book which puts this Case in *Kelloway* is 136, *a*. saith, that if a Master correct his Servant, or Lord his Villain, and by force of that Correction he dieth, although he did not intend to kill him, yet this is Felony, because they ought to govern themselves in their Correction in such Ways that such a Misadventure might not happen. And I suppose, because the Word Misadventure is there used, therefore *Poulton* concludeth (it may be truly) that it is but Misadventure.



Vide Coke Pl. Cor. in his Chapter for cutting out Tongues, p. 62.

Ante 88.

It is but Misadventure in this Case if death ensue upon Correction, if it be with such Things as are usual to correct withal.
Vide Dalton, Justice of Peace, 285, 308, or 335, according to the edition. Books cited to this Purpose. 1 H. P. C. 473.

And

¹ In some Editions p. 123.

1 Hawk. 85.
1 H. P. C. 454.
473, 474.
5 Mod. 289.
Fost. 262.
Cowp. 830.

And in this Principal Case, upon Certificate, many Persons of good Commendation of the general esteem that *Grey* had, I did certify the King, that though in strictness of Law, his Offence was Murder; yet it was attended with such Circumstances as might render the Person an Object of his Majesty's Grace and Pardon, he having a very good Report among all his own Company of his own Trade, and of all his Neighbours, and upon this the King was pleased to grant him his Pardon.

Tomson's Case.
1 Hawk. 101.
8 Mod. 164.
12 Mod. 629.
But vide 12
Mod. 256.

One slain in
endeavouring
to part two
fighting where
it is Murder.

At the Sessions in the *Old Baily* holden after [66]
Hilary Term, anno 17 *Caroli Secundi*, *Thomas Tomson* was indicted for murdering of *Allen Dawes*, and the Jury found a special Verdict to this Effect, viz. that the Day, Year, and Place in the Indictment mentioned, *Thomas Tomson* the Prisoner and his Wife, were fighting in the House of the said *Allen Dawes*, who was killed, and the said *Allen Dawes* seeing them fighting, came in and endeavoured to part them, and thereupon the said *Tomson* thrust away the said *Dawes*, and threw him down upon a piece of Iron, which was a Bar in a Chimney, which kept up the Fire, and by that one of the Ribs of the said *Dawes* was broken, of which he died; and if the Court judge this Murder, they find so, or if Manslaughter, then they find so.

1 Hawk. 102.
Fost. 310.

And I put this Case to my Lord Chief Justice Baron *Hales* and my Brother, and some other of my Brethren, and we all agreed as it is resolved in *Young's Case*, Co. 4; 40. Report, and also in *Mac-kally's Case*, Co. 9. Report, page 61. that if upon a suddain Affray, a Constable or Watchman or any that come in aid of them, who endeavour to part them, are killed, this is Murder; and we hold likewise,

wife, that if no Constable or Watchman be there, if any other Person come to part them, and he be killed, this is Murder: For every one in such Case is bound to aid and preserve the King's Peace. But in all those Cases it is necessary that the Party who was fighting and killed him that came to part them, did know or had Notice given, that they came for that Purpose. As for the Constable or other Person who cometh to part them, to charge them in the King's Name to keep the King's Peace, by which they have Notice of their Intents; for otherwise if two are fighting, and a Stranger runs in with Intent to part them, yet the Party who is fighting, may think he cometh in Aid of the other with whom he is fighting, unless some such Notice be given as aforesaid, that he was a Constable, and came to part them: And that appeareth by *Mac-kally's* Case before cited, where in case of an Arrest by a Serjeant, it is necessary to make it Murder that the Serjeant tell him that he doth Arrest, for else if he doth say nothing, but fall upon the Man and be killed by him, this is but Manslaughter, unless it appear that the Person arrested did know him to be a Serjeant, and that he came to arrest him; for as the Case is there put, if one seeing the Sheriff or a Serjeant whom he knoweth hath a Warrant to arrest him, and to prevent it before the Officer come so near as to let him know he doth arrest him, he Shoots again at him, and kills him, this is Murder; and in the principal Case though the Jury find that *Dawes* came to part the Man and Wife, yet it doth not appear whether it is found that *Tomson* knew his Intent, nor that *Dawes* spake any Words whereby he might understand his Intention, as charging them to keep the King's Peace,

*Vide Lambert
Finsberbert, Fol.
262, Dyer 128.
1 Hawk. 102.
Fost. 272.*

[67]

1 Hawk. 102.

&c.

8 Mod. 164.
Fost. 275.

Burglary, tho'
no Person be
in the House.
1 Hawk. 133.
Ante 83.

Burglary by a
Servant in his
Masters House,
drawing a
Latch of a Door
is actual break-
ing of a House.
1 Hawk. 130-
132.

To make a
Robbery of a
House within
the Stat. 23 H.
8. cap. 1 & 5
E. 6. c. 9, take
any Clergy
away, there
must either be
an actual break-
ing of the
House, or such
a violence to
some Person
there that they
are put in fear
or dread. *Vide*
my Reasons for
it in this Dis-
course, for
which I hold
the last Resolu-
tion in *Baynes's*

Et c. And so we held it to be only Manslaughter, which in Law is properly chance-medley, that is where one Man upon a suddain Occasion kills another without Malice in Fact, or Malice implied by Law.

If a Person in the Night Time break a House, and steal Goods, this is Burglary, though no Person be at that Time in the House. So if a Man hath two Houses, one in the City and another in the Country, and while he is in the one House the other is broken open, no body being in it, and Goods stolen, this is Burglary, *Popham's Reports* 42 and 52 by all the Judges.

A Servant in the House lodging in a Room remote from his Master in the Night Time, draweth the Latch of a Door to come into his Master's Chamber, with an intent to kill him, this on a special Verdict agreed by all the Judges to be Burglary.

Note, That in *Popham's Reports* 84. In one *Baynes's Case*, it is said, that the said *Baynes* with another coming in the Night Time to a Tavern to drink, the said *Baynes* stole a Cup in which they drank out, of a Chamber in the said House, his Wife and Servant being in the said House, for which he was indicted and found guilty; and it is there reported, that by the Opinion of *Anderson*, *Popham*, and *Periam*, and the then Recorder and Serjeant at Law there present, it was agreed that this was no Burglary; which certainly is good Law, because there was no actual breaking of the House, which is of necessity to make a Burglary. [68] *Vide Co. Pl. Cor.* 64. But in that Case of *Baynes*, it is there said, that it was resolved by them there likewise, that that stealing was such a Robbery for which he was ousted of the Benefit of his Clergy by the Stat. of 5 E. 6 cap. 9. and was hanged, which last

laſt Reſolution I hold clearly not to be Law; for that that *Statute* of 5 *Ed.* 6. *cap.* 9. is only to enlarge the *Stat.* 23 *H.* 8. *cap.* 1. which amongſt other Crimes took away Clergy from ſuch Perſons who robbed any in their Houſes, theiſ Wives, Children, or Servants being there, and put in fear or dread. Now that *Stat.* of 5 *Ed.* 6. ordained that although the Perſons who were in the Houſe, lay in ſome other part of the Houſe, which was robbed, and were aſleep at the Time, and ſo did not hear the Thieves, and conſequently were not put in fear, yet that *Statute* taketh away Clergy in that Caſe; but notwithstanding there muſt be a Robbery, for both the *Stat.* of 5 *Ed.* 6. and the *Stat.* of 23 *H.* 8. is againſt ſuch as ſhall rob Men in their Dwelling Houſes. Now the taking away of a Cup in which Men are drinking, as *Bayne's* Caſe was, is only Larceny and no Robbery, for Larceny is deſcribed to be a fraudulent taking away of another Man's Goods above the Value of 12*d.* with an Intent to ſteal them, *Poulton de pace* 125,¹ *b.* and *Stamford Pl. Cor.* 24. *a.* but Robbery is deſcribed to be a Rapine that is, a violent taking any thing from a Man's Perſon; and when it is applied to robbing of Houſes, there muſt be the ſame circumſtance of Force *Vide Poulton de pace* 128.² *Stamford Pl. Cor.* 27, *a.* *b.* *Co. Pl. Cor.* 68. For of neceſſity there muſt be ſomething to diſtinguiſh a Robbery in a Houſe, from that which is but a mere Larceny, and that is one, *viz.* The Larceny is only fraudulent without any actual Force, and a Robbery is done with Force; and this will appear by examining the Nature of Burglary, which is the robbing of a Houſe

Cafe to be no Law.
1 Hawk. 130.
1 H. P. C. 552.
1 H. P. C. 553.
1 H. P. C. 554.
Hut. 20.

1 Hawk. 150.

¹ In other Editions p. 129. ² In other Editions p. 132.

House by Night, there must be Force committed, as the actual breaking of a House makes it Burglary: For if the Door of a House be open, and a Thief enter in the Night and steal Goods, this is only Larceny, and no Burglary, because there was no Force, which is that which distinguished Robbery from Larceny. Now this Force, which will make a robbery of a House within those Statutes to take away Clergy, may either be an actual breaking of the House, or an Assault upon the Person. And therefore if Company come to drink in a Tavern, or other Victualling-house, and being there they break open a Door of another Chamber or Cupboard in the Wall which is fixed to the Freehold, and steal away Goods, this is a Robbery, for which Clergy is taken away by those Statutes. But the breaking open a Trunk or Box, and taking away things is no Robbery of a House within the Statute, because those things which were broken were no part of the House: and so likewise it is in case of Violence offered to the Person of a Man, and taking away his Goods with force. As in case a Thief cometh into a Man's House or Shop, the Door being open, and assaults the honest Man in the House or Shop, and taketh away things by Violence, this is likewise a Robbing of a House within those Statutes, but if in those cases he had come into the House or Shop, and privately stolen away any thing, that had been only Larceny, and not Robbery: and this exposition agreeth with the sense of the Parliament in the Statute of 39 *Eliz. c. 15.* which expounds Robbing of Houses in the day time to be the actual breaking them; for all former Statutes took away Clergy where a House was robbed in the day time, some Person being then in the House; but this Statute of 39 *Eliz.* recites the mischief,

^a Hawk. 495.

¹ H. P. C. 553.

² H. P. C. 357.

^a Hawk. 495.

And the Stat.
1 E. 6. 12.
calls that
breaking of
Houses, which
the Stat. 23 H.
8. & 5 E. 6.
calls robbing of
Houses, and so
expounds them.

chief, because Robbing of Houses when no Person was therein, was not so penal as Robbing them when some Person was therein, and thereby had Persons took opportunity to commit many Robberies in Houses when people were gone abroad to hear Divine Service, or gone to their Labour, and declareth that, that Robbery was, *viz.* by breaking and entering into Mens Houses at such time, and enacts that such Robbing of any House, and stealing from thence Goods of the value of 5*s.* they shall not have the benefit of the Clergy, which I think is a full exposition that Robbing of Houses; in that case, must be an actual breaking, that is, an actual force committed in breaking of the House; but in the other case that I put of Robbing a Man in his House by assault upon his Person, as where a Thief enters the House or Shop of a Man without any actual breaking, the Door being open, and by Violence takes away his Goods, in that Case I conceive the Indictment must express that he did assault him and put him in fear, because that Circumstance is necessary to be laid to make it a Robbery from a Man's Person, and therefore 5 *Eliz. Dyer* 224, *b.* One being indicted for taking of Money from the Person of a Man by the High-way, had his Clergy, because it was not said that he was put in fear, and the Book saith *quod non est robberia* if the Person be not put in fear, although Goods be taken from his Person: and for that Cause was the Statute of 8 *Eliz. cap. 4.* made to take away Clergy from him who privily taketh away any Money or Goods from the Person of a Man. If Thieves come into a House by Night, the Door being open, and take away Goods, this is no Burglary, as hath been said before. But in that case, if they put any in the House

2 Hawk. 493.

[70]

1 Hawk. 215.

2 Hawk. 490.

2 Hawk. 493.

1 H. P. C. 552.

Coke: Pl. 68.

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2 Hawk. 492.

House in fear and dread, and take away Goods, I hold this to be robbery of a House, for which the Thieves are ousted of Clergy by the Statute of 23 H. 8. *cap.* 1. If the indictment be laid, that they put those in the House in fear and dread, and that be proved upon the Evidence.

Messenger, Applaire, Basely, Green, and others indicted for levying War and pulling down Bawdy-houses, and breaking open Prisons.
2 St. Tr. 591.
1 H. P. C. 134.
Fost. 215.

Memorandum, That at the Sessions at the *Old Bailey*, after *Easter* in the twentieth Year of King *Charles* the 2d. Several dissolute Persons having on *Easter* Tuesday and Wednesday next before assembled together, and led by Persons whom they called Captains, and having Colours, *viz.* Aprons, &c. on Staves, went to several places on pretence to pull down Bawdy-houses, and break open Prisons and set Prisoners at Liberty, and having actually pulled down some Houses, and broke up the Prison at *Clerkenwell*, and let out four Prisoners there, were by the direction of the King's Council, *viz.* *Mr. Attorney, Sir Jeffery Palmer*, having Order to proceed against them prosecuted, he directed four indictments to be preferred against them, who were taken, *viz.* one indictment against *Peter Messenger, Richard Basely, William Green, and Thomas Applaire*, and another indictment against *Edward Cotton*, and a third against *Edward Bedell and Richard Lattimer*, and a fourth against *Thomas Limerick*. All the Indictments were, that they with other Persons to the number of 500, unknown to the Jurors, being armed in a War-like manner with Swords, half Pikes, Halberts, long Staves and other Arms Offensive and Defensive, with Force and Arms unlawfully, and traiterously assembled themselves together, and levied War against the King, &c. and first I told them they had not done well to make so many several indictments, for by that means

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means the King's Evidence would be broken, whereas if all had been put into one indictment, the Evidence as to the main Design would have been intire against all, and then the assembling in several places to the same intent had made the matter more foul, and would have been aptly given in Evidence against them all to the same Jury, and the several Acts which each of them did, would have come in better ; but however we proceeded upon the indictments as they were, and after the Evidence given against the four in the first indictment, when I came to give Directions to the Jury, I told them that although I was well satisfied in my own Judgment, that such assembling together as was proved, and the pulling down of Houses upon pretence they were Bawdy-houses, was High-Treason, because they took upon them regal Power to reform that which belonged to the King by his Law and Justices to correct and reform : and it would be a strange way and mischievous to all People to have such a rude rabble without an indictment to proceed in that manner against all Persons Houses which they would call Bawdy-houses, for then no Man were safe, therefore as that way tore the Government out of the King's Hands, so it destroyed the great privilege of the People, which is not to be proceeded against, but upon an indictment first found by a Grand Jury, and after upon a legal Tryal by another Jury where the Party accused was heard to make his defence ; yet I told them, because the Kings of this Nation had oftentimes been so merciful as when such Outrages had been heretofore done not to proceed capitally against the Offenders, but to proceed against the Offenders in the Star-Chamber, being willing to reduce their People by milder ways if it were possible

sible to their Duty and Obedience; yet that lenity of the King in some Cases did not hinder the King when he saw there was need to proceed in a severer way, to take that course which was warranted by Law, and to make greater Examples, that the People may know the Law, is not wanting so far to the safety of the King and his People, as to let such Outrages go without capital punishment, which is at this time absolutely necessary, because we ourselves [72] have seen a Rebellion raised by gathering People together upon fairer Pretences than this was, for no such Persons use at first to declare their wickedest Design, but when they see that they may effect their Design, then they will not stick to go further, and give the Law themselves, and destroy all that oppose them: but yet because there was no body of the Long Robe there but my Brother *Wylde*, then Recorder of *London*, and myself, and that this Example might have the greater Authority, I did resolve that the Jury should find the matter Specially, and then I would procure a meeting of all the Judges of *England*, and what was done should be by their Opinion, that so this Question might have such a Resolution as no Person afterwards should have reason to doubt the Law, and all Persons might be warned how they for the time to come mingle themselves with such Rabble on any kind of such Pretences, and thereupon the Jury as to the first four in the first Indictment gave a Special Verdict to this Effect, viz.

A Special Verdict as to *Messenger, Applesree, Bafely*, and *Green*.

2 Hawk. 622.

They find that the 24th of *March* last, a great number of Persons to the number mentioned in the Indictment were assembled together in *East Smithfield* and *Moorfields* in the County of *Middlesex* with Arms mentioned in the Indictment, on pretence of pulling down Bawdy-houses, that *Bafely* led them, and

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and was called their Captain, and had in his Hand a naked Sword which he brandished over his Head, and that *Messenger* had a piece of green Apron on a Staff, which he flourished as Colours in the Head of the Company, and that *Basely*, and he led the Company as their Leaders; that they did the like on Wednesday the 25th of *March*, and were breaking down Houses. That *Peeverell*, one of the Constables of *Middlesex*, having a Constable's Staff in his hand, came to them with other Persons to aid him, and charged them to depart and keep the Peace, and thereupon, *Basely* with his sword struck him, and wounded him, and several Persons assembled with him, struck him down, and took away his Constables Staff. That the said *William Green* was among them casting up his Cap, and hollowing with a Staff in his Hand, and that whilst he was amongst them he was knocked Down by a Party of the King's Soldiers that came to suppress them, and [73] was then taken. That *Basely* struck at the Ensign that led those Soldiers: that the said *Appletree* was among them both Dayes and was the first that struck at *Peeverell* the Constable, and was amongst them at *Burlingham's* House at *Saffronhill* in the County of *Middlesex*, and pulled part of the House down, and the next House to it, and struck at one that admonished him to be quiet. And if on the whole matter, it shall seem to the Court that they are guilty of the Offence mentioned in the Indictment, then they find them Guilty, &c.

On the 2^d. Indictment as to *Cotton* alone, the Jury did find that at the time and place mentioned in the Indictment, a great number of Persons, to the number mentioned in the Indictment, met together armed with Swords, Clubs, Staves and other Weapons,

Special Verdict
also as to
Cotton.
2 St. Tr. 591

Weapons, under pretence of pulling down Bawdy-houses, and had a Cloth on a Staff for an Ensign carried before them. And that *Sir Philip Howard*, with a Troop of the King's Guard, found them armed in such seditious manner, and commanded them to disperse, that they refused so to do, and threw Stones at him, that some of them enquired who it was that led those Guards, whether it was the Duke of *York*, and being told it was, they presently threw Stones at *Sir P. H.* who led the Horse, and some of them said that unless the King would give them liberty of Conscience, *May-Day* should be a bloody day, others did Kill the Guards, and others said, that they would come and pull down *Whitehal*, and others said they would be with them at *Whitehal*, (the King's Capital Palace) and that they cared not for the Guards, for they were but 2 or 300, and they could easily knock them on the Head; that they continued many Hours till they were dispersed by the Guards. That *Cotton* who was indicted, was one of them assembled in this manner, and that *Cotton* was amongst them the next day when they were assembled in the same manner, and was pulling down a House in the Parish of *St. Leonard Shoreditch* in the County of *Middlesex*; and if on the whole matter, &c.

Special Verdict
on the third
Indictment.
Bedell and
Lattimer.
2 St. Tr. 591.

On the third Indictment against *Bedell* and *Lattimer*, the Jury find that the day and place mentioned in the Indictment, a great number of Persons to the number mentioned in the Indictment armed as in the Indictment, did meet together in *Clerkenwell Green* in the County of *Middlesex*, on pretence of breaking open Prisons, and releasing Prisoners; that one of them who had a half Pike in his Hand, owned himself to be their Captain; that they came so assembled together to a Place there called the New Prison, [74]

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Prison, being a publick Prison of the County of *Middlesex*, and then and there said, that they came to search for Prisoners, and break open the Prison Doors, and let out four Prisoners, two whereof were committed thither for Felony, and two for other Offences, and that they being charged to depart, replied, they had been Servants long, but now they would be Masters; that some being taken, they cried one die and all die: That *Lattimer* was amongst them, and active in breaking of the Prison, and was with the rest in the Prison after it was broken open; And that *Bedell* was there, and being pursued by one of the King's Soldiers, called out to the rest of the Company to face about, and not to leave him, and if on the Whole, &c.

On the fourth Indictment against *Lymerick*, the Jury find that the Day, Year, and Place in the Indictment mentioned, a great number of Persons to the number, &c. assembled together on pretence of pulling down of Bawdy-houses, and being armed *proust* in the Indictment, they marched in warlike Manner, and the said *Lymerick* led them as their Captain with a Club in his Hand, and was owned by the Company to be their Captain: That the said *Lymerick* had the said Persons to the House of *Peter Burlingham*, and they pulled down the said House, and destroyed and took away divers Goods of the said *Burlingham's* to the value of 30*l*. And if on the whole Matter, &c.

Special Verdict
as to *Lymerick*.
a St. Tr. 591.

And in *Easter* Term following, all the Judges met at my Chamber, there being then but eleven. My Lord *Bridgeman*, who was Chief Justice of the Common Pleas being then Lord *Keeper*, the Judges were myself, Chief Justice of the King's Bench, Sir *M. Hales* the Chief Baron, and my Brother *Atkins*,

Q

Brother

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Brother *Twisden*, Brother *Tyrell*, Brother *Turner*, Brother *Wyndham*, Brother *Archer*, Brother *Rainford*, Brother *Morton*, and Brother *Wylde*.

And on the whole Matter the Chief Baron *Hales* [75] delivered his Opinion, that there was no Treason in the Case, because he said that the *Stat. 1 Q. Mary, cap. 12.* is, that if any Persons to the number of Twelve or more assemble to the Intent to pull down Enclosures, &c. with Force, and continue together an Hour after Proclamation made for their departure it shall be Felony, and if those Actions had been Treason at Common Law, it had been to no Purpose to make it Felony.

But all the other Judges answered, that this was the Objection made by some Judges in the Case of *Bradshaw* and *Burton*, which is reported by *Popham* in his Reports, p. 122. And there it was resolved, that if any Persons assembled with Force to alter the Laws, or to set a price on Viſuals, or to lay violent Hands on the Magistrate as on the Mayor of *London* and the Like, and with Force attempt to put the same in Execution, this is a Rebellion and Treason at the Common Law; and they there resolved that the Statute of 1 *Mary* was to be intended where Persons to the number of Twelve or more pretending any or all of them to be injured in particular, as by Reason of their common or other Interest in the Land inclosed, and the Like, assemble to pull it down forcibly in Cases where they have an Interest, or where in particular, they are annoyed or grieved, that is not Treason: But in case their Aſſ goeth generally to pull down Inclosures in which they, or any of them are not particularly concerned, this Aſſ if it be put in Execution by force is Treason at Common Law. And it was agreed by us all, that

1 Hawk. 12,
513, *et seq.*
1 H. P. C. 134.
The Reasons of
Hales Opinion
in this Case.
1 H. P. C. 131.
2 St. Tr. 593.

2 St. Tr. 593.

that the *Stat.* of 13 *Eliz.* which maketh the Intention in many cases Treason, extends to nothing, but where if the Act had been done it had been Treason at the Common Law.

And therefore all the rest of the Judges did unanimously agree that this rising with Intent to pull down Bawdy-houses in general, or to break open Prisons in general, and let out Prisoners, and putting their Intention in Execution by Force, any of these [76] Instances was a levying War against the King, and High Treason at Common Law within the Declaration of the *Stat.* of 25 *Ed.* 3. And for that, besides the Resolution in *Popham's* Reports before cited, we considered the Case of the Apprentices reported in the second Part of *Anderson's* Reports, p. 4 and 5. where it was resolved that by the Statute of 13 *Eliz.* If any intend to levy War for any Thing which the Queen by her Laws and Justice ought to do, and reform in Government as Queen, this shall be an intendment to levy War against the Queen within that Statute of 13 *Eliz.* And as we said before, nothing can be Treason by the Intention within the Statute which had not been Treason by the Common Law, if it had been actually put in Execution. And see the same Book of *Anderson* second Part 66, and by the case of several Persons in *Oxfordshire* rising to pull down Inclosures in general, resolved accordingly, in which Case it was also resolved, that if any Persons rise and assemble together, with intent to levy War, the Justices of the Peace and Sheriffs may use Force to suppress such Rebels without any special Commission or Warrant, and this by the Common Law: And see *Popham's* Reports 121, and a Resolution of all the Judges, 39 *Eliz.* that any Justice of the Peace, Sheriff,

2 St. Tr. 593.

Coke, Pl. 9.

3. H. 7. 1. 10
Popham 121.

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1 Hawk. 12,

517.

2 St. Tr. 594.

1 St. Tr. 197.

Cro. Car. 583.

1 Jones 455.

S. C.

Cro. Car. 583.

Cro. Jac. 404.

Cro. Car. 448.

con.

Sheriff, or other Magistrate, or any other Subject of the King may by the Common Law arm themselves to suppress Riots, Rebellions, or resist Enemies and endeavour themselves to suppress such disturbers of the Peace: But they said the most discreet Way was for every one to attend and assist the Justices in such Case, or other Ministers of the King in doing of it, and *Coke, Pl. Cor.* 9. If any levy War to expulse Strangers, to deliver Men out of Prison, to remove Councillors, or to any other end pretending Reformation on their own Heads without Warrant, this is a levying of War against the King, because they took upon them Royal Authority. And *Moor's Reports*, p. 620, 621. in the Case of the Earl of *Essex*, in which amongst other Things it was resolved, that his attempt with Force to remove the Queen's Councillors was High Treason, and likewise that the Earl of *Southampton*, who adhered to him, although he knew of no other purpose of the Earl of *Essex*, but a private Quarrel against some of the Queen's Servants, yet this was Treason in him, the Act of the Earl of *Essex* being Rebellion and Treason, and so it was also resolved, that all those who went with him out of *Essex-house* in aid of him, it was Treason in them, whether they knew any thing of his Intent or not, and *Cro. 1st part* p. 583. In *Benstead's* Case, it was resolved by all the Judges, that going to Lambeth-house in Warlike Manner with Drums, and a Multitude as in the Indictment, to the Number of 300, &c. to surprize the *Arch-Bishop*, who was a Privy Councillor, was Treason. And 2dly, it was resolved that the Justices of *Oyer* and *Terminer*, may sit, enquire and try Prisoners all in one Day. 3dly. It was resolved, that the breaking of a Prison wherein Traitors were in durance,

[77]

durance, and causing them to escape, was Treason, although the Parties did not know that Traitors were there. And so to break a Prison whereby Felons escape, this is Felony, though they do not know them to be in Prison for such Offence. *Note*, That Resolution as to breaking a Prison where Felons, &c. are, must (as I think) be intended only where the Intent was only to break open one Prison and no more, for if the Design was to break open Prisons in general, and they put that in Execution as to one Prison, that is High Treason according to the Books before cited; but then on the Evidence it must be proved that their Intent was such, and by such proof as satisfieth the *Jury*.

After this Resolution in general, we went to consider the particular Cases as they were found upon the several special Verdicts; and thereupon it was agreed by all of us, except the Chief Baron, who said he doubted on the Main, that as to *Messenger* and *Bafely* in the first Verdict, and to *Cotton* in the second special Verdict; and as to *Lymerick* in the fourth special Verdict, that the Matter as it was found against these four, was High Treason in them all, and accordingly they had Judgment, and were executed: But as to *Appletree* in the first special Verdict; and as to *Lattimer* in the third special Verdict, there was difference in Opinion amongst us, [78] whether the Verdict was sufficiently found against them to judge it High Treason or not. For besides the Chief Baron who was against all, my Brother *Atkyns*, *Tyrell*, *Wyndham*, and *Wylde*, held that the Verdict was not sufficient against those two for to give Judgment that they were guilty of Treason, because they said it was not expressly found, that they were aiding and assisting: But myself, Brother *Turner*,

2 St. Tr. 594.

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Turner, Twisden, Archer, Raynsford, and Moreton, thought the Verdict as it was found against them to be as full and plain as any of the Rest. For first as to *Appletree*, the Verdict first finds in general, that the Number in the Indictment were assembled, as in the Indictment, with an Intent to pull down Bawdy-houses; that *Bafely* led them as their Captain, that *Messenger* had a green Apron upon a Staff, which he flourished as Colours, and then that *Appletree*, the Person now in Question, was amongst them both the Days, and was the first that struck at *Peverell* the Constable, and was amongst them at *Burlingham's* House at *Saffron-hill*, and pulled part of that House down, and the next to it, and struck at one that admonished him to be quiet, so that here are several Acts of Force found to be actually committed by him in pursuance of their Design, and then there is no need to find him to be aiding and assisting, for that Clause we said was only necessary to be found where the Jury find a Person was there amongst them, and find no particular Act of Force done by him, but only his Presence, there it is necessary that they find he was present aiding and assisting; and for the same Reasons we held the Verdict to be full also against *Lattimer*, because it was first found that the Multitude was assembled as in the Indictment, on pretence of breaking Prisons and releasing Prisoners in general, which is agreed by all (except the Chief Baron) to be Treason, and then they find that *Lattimer* was amongst them, and active in the breaking open the Prison at *Clerkenwell*, (where Prisoners, some for Felony, and others were let loose) and that he was with the rest in the Prison after it was broken open, and so an Act fixed upon him: But although six of [79] us were well satisfied in our Judgments as to them, yet

yet when I waited on the King, I acquainted him that there was some difference in Opinion as to those two upon finding of the special Verdict; and although the greater Number of us were of Opinion, that the Verdict was well found as to those also, yet I intreated his Majesty to make use of that difference in Opinion to shew his Mercy towards them, the rather because we had agreed, that as to four of them the Verdict was clearly good as to proceed to Judgment against them, and that I hoped would be example enough to deter others from the like Practices; and besides it would appear an Instance of his Majesty's great Mercy, that he would not proceed to the last extremity against any, where there was not a full Concurrence of all his Judges, which his Majesty was pleased to take very graciously, and ordered me to proceed accordingly, and so they two were spared: But as to *Green* in the first special Verdict; and *Bedell* ^{a St. Tr. 594.} in the third special Verdict, we all agreed that the Verdict was not full enough as to them for us to judge it Treason in them, because the Verdict only finds that they were present, and finds no particular Act of Force committed by them, and doth not find that they were aiding and assisting to the rest, and it is possible one may be present amongst such a Rabble only out of curiosity to see, and whether they were aiding and assisting is matter of Fact which ought to be expressly found by the Jury, and not to be left to us upon any colourable Implication, and accordingly ^{a St. Tr. 594.} these two were discharged.

This Question was moved to me at the *Old Baily*; A Man marrieth two Wives, one in *France* and another in *England*, whether he might be indicted and tryed for that Felony here in *England*; and I took this difference, that if his first Marriage was in *France*,

A man marrieth two Wives, one in *France* and another in *England*, in what

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Cafe he may
be tryed here.
2 Hawk. 303.
1 H. P. C. 693.

Diversity.
Vide Syderfin's
Reports, fo.
171.
1 Hawk. 686.

Counterfeiting
the Great Seal.
1 Hawk. 19.

George Leak's
Cafe concerning
the abuse of the
Great Seal.
Hill 4 Jacobi.
Coke 12 Rep.
p. 16.
1 H. P. C. 182.

France, and the second Marriage, which maketh the Felony, was in *England*, then I was of Opinion that he might be indicted and tryed here for it, and the Jury might on Evidence find his first Marriage in *France*, [80] being a mere transitory Act, and having nothing of Felony in it; and our *Juries* usually find such transitory Acts, though they are done in a Foreign Nation; but if the first Marriage was in *England*, and the second in *France*, then I was of Opinion he could not be tryed for it here, because the Act which made the Felony was done in another Kingdom, and Felonies done in another Kingdom are not by the Common Law triable here in *England*. *Quare.*¹

By counterfeiting the Great Seal, what shall be Treason and what not, see *Co. pl. Cor. fol. 15. 40 Ass. pl. 34, 42 B. 3.* The Abbot of *Brewer's Cafe*, who caused his Commoygn to raze the Name of one Mannor in Letters Patent under the Great Seal, and to put in another Mannor instead of it, and 2 *H. 4. fol. 25. 37 H. 8. Br. Title Treason.* But after all these Books was *George Leake's Cafe*, a Clerk of the Chancery, who joined two clean Parchments fit for Letters Patents so close together with Mouth-glew, as they were taken for one, the uppermost being very thin, and did put one Label through both, then upon the uppermost he wrote a true Patent, and got the Great Seal put to the Label, so the Label and the Seal were annexed to both the Parchments, the one written, the other a blank; then he cut off the glewed

¹ "Why not? For the Words of the Statute are, that the Parties so offending, shall receive such and the like Proceeding, Trial and Execution, in such County where such Person or Persons shall be apprehended, as if the Offence had been committed in such County where such Persons shall be taken or apprehended." 1 Hawk. 20, and *Notis ibid.*

glewed Skirts round about, and took off the uppermost thin Parchment in which the true Patent was writ from the Label which with the Great Seal did still hang to the blank Parchment, then he wrote another false Patent upon the blank Parchment and published it as a good Patent: And the Question was, whether this Offence was High Treason or not: And it was resolved by all the Judges of *England*, that this Offence was not High Treason, but it was a very great Misprision. *Vide Hale Pl. C. 18.*¹

[81] A Person hireth Lodgings in another Man's House, with Hangings, Bedding, and other Furniture in those Lodgings for a Month, and during that Time, conveyeth away the Goods in the Lodging which he had hired with the Lodging, and the Party runneth away at the same Time, and is after taken and indicted for this as for Felony, and whether this be Felony or not is the Question.

3 Wil. and M. cap. 9, sect. 5.
This is not found in the original Manuscript, but may be fit to be reported, because said to come from Mr. Serjeant *Kelyng*.

Son to the Chief Justice. 1 Hawk. 146, 153. and Not. ibi. 1 Hale 504.

This Case is in this Book, and came before my Lord *Bridgeman*, then Chief Justice of the Common Pleas, myself then Judge of the King's Bench, and my Brother *Wylde*, then Recorder of *London*, at a Sessions in the *Old Baily*, and then we all were of Opinion that this was no Felony, because the Party had a special Property in the Goods by his Contract, and so there could be no Trespass, and that there could be no Felony where there was no Trespass, as was resolved in *Holmes's Case*, who set Fire to his own House, which was quenched before it went any further, and accordingly the Prisoner was by us then discharged.

Vide Ante 29. Raven's Case.

1 Jon. 351.
Cro. Car. 376,
7.
Ante 42.
Sed vide *Fost.*
116.

But

¹ This ought to be, as I believe, Sum. or Coke, Pl. cor. 16.

But upon more serious Thoughts I take it to be a Case worthy of great Consideration, because I think the Case in the 13 *Ed.* 4. *fo.* 9. which was by the King and his Council referred to all the Judges in the *Chequer-chamber*, and by them resolved to be Felony, is a stronger Case than the Case now put.

There the Case was, one bargained with another to carry some Packs of Goods for him to *Southampton*, and delivereth the Goods to the Carrier, and he taketh them and carries them to another Place, and there opens the Packs, and takes the Goods, and disposes of them to his own Use, and the Question was, whether that was Felony or not; [82] and though it was objected that the Goods were bailed to the Carrier, and therefore there could be no Felony, that was agreed generally to be good Law. And it was also objected that an Indictment against one that he *felonice asportavit* such Goods, is not good, but it must be *felonice cepi & asportavit*, and in that Case the taking was lawful; yet it was resolved that it was Felony, because his subsequent Act of carrying the Goods to another Place, and there opening of them, and disposing of them to his own Use, declareth that his Intent originally was not to take the Goods upon the Agreement and Contract of the Party, but only with a Design of stealing them. Now methinks the Case in Question is much stronger: For in that, the Party himself cometh to hire the Lodgings and Goods, and when he after taketh them away, this declareth that his original Intent was only by the hiring of them to give himself the Opportunity to steal them, and so his first hiring them is, *in fraudem Legis*, and of that he shall take no Advantage, *Co. Pl. Cor.* 64. Some under

1 H. P. C. 552.

1 Hawk. 146.

under pretence of a Robbery raise a Hue and Cry, and call a Constable to search a House in the Night Time, and the Constable coming, the Owner of the House, opens the Door, and then those Persons bind the Constable, and those in the House, and Rob them, this is Burglary; because they procured the Door to be opened to them in the Night by Fraud: So in this Case, the Party hiring the House by Fraud, only to have an Opportunity to steal the Goods, shall not take Benefit of the Fraud. And Mr. Lee told me, that it had been resolved, that, *if one come into Smithfield on pretence to buy a Horse, and cheapen one, and the Owner giveth him leave to take the Horse and ride him to try his paces, and then he taketh the Horse and rideth quite away with him, this is Felony.* And so if one deliver Goods to a Porter in London to carry to a certain Place, and he taketh them and carrieth them away to another Place, and there openeth and disposeth of them, this is Felony; which last Case seemeth to be warranted by the Case before cited out of 13 E. 4. *Note,*

[83] That the breaking open the Packs and disposing of the Goods is necessary to shew the Intent of stealing.

But I marvel at the Case put, 13 E. 4. 9. *b.* That if a Carrier have a Tun of Wine delivered to him to carry to such a Place, and he never carry it but sell it all, this is no Felony; but if he draw part of it out above the Value of Twelve-pence, this is Felony; I do not see why the disposing of the Whole should not be Felony also.

But the Case there put is, a Carrier does carry the Goods to the Place appointed, and after takes them away and disposeth of them, that is Felony, because the bargain for his bringing them was determined

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mined when he brought them to that Place appointed, and the Possession then is in the first Owner.

1 Hawk. 134,
135.
Contra.
But with a
Quære in the
Margin.

1 H. P. C. 556.
Contra.
Cowper 2.

A Man having a Dwelling-house lets a Cellar, to which the Passage is out of a Street and a Chamber, to J. S. and he lieth in the Chamber, and the Cellar is broken open in the Night. If this be Burglary? I thought not, and took a difference betwixt an Inmate and a divided House, which is, where there are several Doors, and one Dwelling actually divided and separated from the other, there it is Burglary, and shall be laid for breaking the Dwelling-house of him who hired the divided Part. But as to an Inmate who goeth in at the same Door, he is in the Nature of a Lodger, and if his Chamber be broken open, I thought it Burglary. But you must lay the Indictment for breaking the Dwelling-house of him that let it, and not of the Inmate, because I thought it was but one Dwelling-house, in case there be twenty Inmates: And though there be a private Contract between the Parties, that hath not severed the Dwelling-house, so as to make them several Dwelling-houses. For then, what need that difference of Inmates and divided Houses? For if an Inmate [84] hath a divided Dwelling-house, he differs nothing from the other. But Mr. Lee desired that it might be advised of, because he saith their use hath been otherwise, and he said that else, if the Rooms of the Inmate where he lieth were broken open in the Night Time, there would be no Burglary, because he said the Contract had severed them from the Dwelling-house of him who let them. But in that I differed; for I think that where there is but one out Door, at which the Owner and Inmate enter, this remaineth to be all the Dwelling-house of the Owner; and though the Inmate

Inmate hath an Interest against the Owner that will not serve to make it the Dwelling-house of the Inmate. But the Indictment must be for Burglary, in breaking the Dwelling-house of the Owner, and stealing the Goods of the Inmate. (*Quere.*) But for the first Question, where a Cellar which hath its going into it only out of the Street is let to a stranger; if this Cellar is broken open, I conceive it no Burglary, for it is separated by the Contract, and actually severed from the House by excluding all Communication with the House, no passing being betwixt the House and the Cellar. So it hath been resolved, if a Man let a Shop only, and sever it from his House for Years, &c. and the Party who hath the Shop doth not lodge in it, and this be broke open in the Night, this is no Burglary. And how to make such a Cellar and a Chamber in the Dwelling-house, which are let to an Inmate to be the Inmate's Dwelling-house, I do not well understand: Then Mr. Lee said it might be of ill Consequence; for now since the late Fire, every House hath many Inmates, where Inmates Lodge. And suppose he who hath the Dwelling-house (and lets the several Rooms to those Inmates) should in the Night break open their Rooms and steal their Goods, it would be hard if it should not be Burglary. To that I say it is Felony in the Owner of the House, if he steal their Goods; but to make it Burglary to break his own House, in case the Law be as I suppose, that cannot be. And I suppose letting of Lodgings to several Persons, doth not make several Houses if they all go in at the Door of him who lets the Lodgings, and so are but Inmates. But otherwise it is, if a Man sever some Rooms from his House, and make another Door to those

1 H. P. C.
Contra 556.
1 H. P. C. 537.

1 Hawk. 134.
contra.

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those Rooms, and so divide the House, that divided Part is the Mansion-house of him who hires it; and it is Burglary if it be broken open; and shall be laid so, for breaking the Dwelling-house of him who hired that Part.¹

¹ Vide 1 Hawk. 134, 135, and 136.





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TERM. MICH.

15 CAR. II. In B. R.

Sir Charles Stanley's Case.

1 Sid. 159.
1 Keb. 584,
649, 659, 723.
S. C.

This is another
Manuscript of
the Lord Chief
Justice *Kelyng*.
1 Hawk. 102.

[87] **S**IR *Charles Stanley* and one *Andrews*, were
tryed upon an Indictment of Murder. The
Case was, Sir *Charles Stanley* was arrested
by a Bailiff, and endeavoured a Rescue,
and shot off a Pistol at the Bailiff, and
then the Bailiff closed with him and cast him down,
and after some of his Servants and others who came
in aid of him, killed a Servant of the Bailiff's who
came in aid of the Bailiff: And it was resolved by
all the Court, *Hyde*, Chief Justice, *Twisden*, *Wind-*
ham, and *Kelyng*, that if the Party who is arrested
doth any Act of Violence to endeavour a Rescue,
and then after one of his Party killeth the Bailiff,
or any that cometh in his aid, this is Murder in the
Party arrested: For when several Men joyn in an
unlawful Act they are all guilty of whatever happens
upon it; as in the Lord *Dacre's Case* which is
mentioned, 34 H. 8. *Brooke Sect.* 237¹. The
Lord

¹ The above Blank is in the principal Case in the Edition of
this Work, published by Sir John Holt; but the Case there

Moore 86.
1 H. P. C. 439.
465.
Crompt. 25.
Dalt. J. Cap.
93, 298.
Also 145 cap.
p. 331 in other
editions.

Lord *Dacres* and *Manfell*, and others in his Company came unlawfully to hunt in a Forest, and being resisted, one of the Company when the Lord *Dacres* was a great Way off, and not present, killed a Man: Judged Murder in him and all the Rest, and the Lord *Dacres* was hanged. But it was agreed, that if the Party who is arrested yields himself, and makes no Resistance, but others endeavour to rescue him, and he doth no act to declare his joining with them, if those who come to rescue him kill any of the Bailiffs, this is Murder in them, but not in the Party arrested. But in this Case Sir *Charles Stanley* by shooting his Pistol, had joined in resisting the Authority of Law, and therefore a Man being slain in this Act, it is Murder in him. And as for *Andrews*, there was no Evidence, but out of his own Mouth; some discourse as if he had shot over Sir *Charles Stanley* in aid of him when he was down, but the Evidence to that was slight. But it was agreed by us all, that if a Man be arrested, and he and his Company endeavour a rescue, and while they are fighting, one who knows nothing of the Arrest coming by the Way, goeth in aid of the Person who is arrested, and draws his Sword, &c. here if any of the Bailiffs be killed, that Person who joined in aid against them, though he did not know
of

cited is to be found in Moore 86, and it is there said to be in *Easter*. 10 Eliz. though Brooke Tit. Corone 171, (and not 237,) as above cited. It is said to be as in the Text, and Crompton, who cites for this Case Stowe's Annals, fo. 982, also fixes it in 34 H. 8. See also 11 St. Tr. 10, which fixes it on the 9th July, 26 H. 8—1535; and extracts from Hall's H. 8, p. 225, and Lord Herbert's H. 8 in 2 Kenn. Comp. Hist. and edition, page 177.

of the Arrest, yet is guilty of Murder. For a Man must take heed how he joineth in any unlawful Act as fighting is, for if he doth, he is guilty of all that follows. And it being Murder to kill those who come to execute the Law; every one who joins in that Act is guilty of Murder, and his Ignorance will not excuse him, where the Fact is made Murder by the Law without any Malice precedent, as in the [88] Case of killing a Bailiff. But if two Men go upon Malice prepenſed to fight a Duel, and while they are fighting, a Man who is acquainted with one of them joineth and taketh his Part and killeth the other, this is Murder in the Party who came with Malice prepenſed to fight; but it is but Manslaughter in him who came to his aid, because in him there was no Malice, but as to him it was a sudden Thing. And here the Law doth not imply Malice, as it doth in every one who resisteth the Execution of Justice. : H. P. C. 465.



TERM.



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[89]

8 WILL. 3.

Lisle's Case, in Banco Regis.

Trem. 20.
Skinner 670.
Carthew 394.
Comb. 410.
Salk. 60.
12 Mod. 108,
109, 157.
Holt 63. S. C.



AT the *Affizes* and *Gaol Delivery* held for the County of *Cumberland*, at *Carlisle*, 15 *Aug.* last, before Sir *Edward Ward* Lord Chief Baron, and Justice *Turton*, *Thomas Lisle* Gent. was indicted for the Murder of *Richard Armstrong*, upon which he was arraigned, tried, and convicted of Manslaughter only. Immediately after, *John Armstrong*, brother of *Richard*, put into the Court a Bill of Appeal for Murder, and did then pray by his Council, that the Appeal should be received and filed, and that *Lisle* should be immediately arraigned thereupon. Whereupon, and before the Appeal was arraigned, *Lisle* did demand the Benefit of his Clergy; and then the Bill of Appeal by the Council of *Armstrong* was read in open Court, and *Lisle* did appear thereunto, and prayed to be bailed, but refused to plead; upon which he was remanded to the *Gaol quousque*, &c. All which Proceeding was entered upon the Record of the Indictment of Murder, with the Conviction of Manslaughter,

[90] Manlaughter, and was returned upon a *Certiorari* into this Court, and thereupon the Appeal of Murder was also returned; but upon the Record of that, no Mention was made of any Proceeding. *Lisle* was also brought to the Bar upon an *Habeas Corpus* directed to the Sheriff of Cumberland, and was committed to the *Marshalsea*, (though he prayed to be bailed;) but the Court did not think fit to bail him for the Present; for it being the latter-end of the Term, did adjourn the Consideration of it to the next Term; at which Time *Lisle* being brought to the Bar by Rule, the Court was of Opinion that he might be bailed. The Question was, whether one convicted of Manlaughter might be bailed before he had his Clergy? The Case of *Dyer* 297 & 42.¹ is, that he cannot be bailed; which may be admitted to be Law, for though Justices of *Oyer* and *Terminer* and *Gaol Delivery*, might not bail in such a Case, yet the *King's Bench* is not restrained from bailing by the Statute of 1 *W. c.* 15. 2 *Inst.* 185. but hath a Liberty of bailing by the Common Law, if the Person be not attainted. And so was it done in this Court, 10 *Jac. Coke's Entries* 355.² upon the like Conviction of Manlaughter, upon a Trial at the Bar: The Court, without calling the Party to Judgment, took Time to advise until the next Term, and bailed the Prisoner then to appear. Afterwards at another Day, it was questioned, whether the Court should call *Lisle* to know what he could say why Judgment should not be given against him, and if he should demand the Benefit of his Clergy, allow it to him? And after Argument at the Bar it was resolved,

2 Hawk. 170.
Str. 911.
Rex v. Dalton
1242.
Rex v. Ma-
grath.

¹ This ought to be, as I believe, *Dyer* 179. Pl. 42.

² Tit. *Indictment*, Pl. 6.

resolved, that forasmuch as there was a *Record of Conviction returned to the King's Bench, the Court ought to proceed to Judgment thereupon, though there was an Appeal returned to be commenced.*

For these Reasons:

2 Hawk. 225.
Note to Sect.
10.
Carth. 394.
395.
Skinner 670.
Bac. Abr. 5th
Edit. 194.

1. Though the Appeal was not totally discontinued, but had an Existence, yet it was without Day; for being commenced at the *Gaol Delivery*, it had no continuance upon it, nor indeed could it have any, for no continuance can be taken from one Session of *Gaol Delivery* to another, but from one Day to another it may be, if that Session be adjourned, which doth not appear in this Case; but all Proceedings upon Indictments and Appeals commenced at one *Gaol Delivery*, unless Convictions thereupon, are determined by that Session, so that this Appellant and Appellee have no Day in any Court; and the Appeal being removed into the *King's Bench*, the Parties having no Day in Court, the only means to retrieve it, is, for the Appellant to come into Court, and pray that the Appellee being *in custodia Marr'* may be arraigned; and if he was not in the Marshal's Custody, take Process against him, 9. H. 4. 2. St. P. C. 651.¹ which may be done at any Time. But if the Appellee be desirous to be discharged of the Appeal, then he ought to sue a *Scire facias* against the Appellant, and if he doth not appear nonsuit him, St. P. C. 70. a. b. From hence it is to be concluded, that since the Appeal is without Day, and cannot be proceeded upon unless revived in the Manner before mentioned, there is no Reason for the Court to take any Notice of it, but to

[91]

¹ St. Pl. Cor. 165—as I believe.

to proceed upon the Conviction had upon the Indictment, as if no Appeal had been commenced.

2. The Court, as the Matter stands upon this Record, ought to proceed upon the Conviction; for it appears that not only the Indictment was preferred, but even the Trial and Conviction of Manslaughter was before the Appeal commenced; and therefore by the express Words of 3 H. 7. cap. 1. *That in Case of Murder, the Murderers shall at any Time be arraigned and determined at the King's Suit, within the Year, without tarrying for an Appeal.*¹ Now the Indictment being proceeded upon, and the Party tried before the Appeal commenced, the Court of Gaol Delivery ought to determine it; for though the Appeal interposes after Conviction, and before the Convict upon the Indictment is called to Judgment, yet the Judgment upon it hath relation to the Conviction, and on the giving of it no Notice is to be taken of the Appeal, nor is any Entry to be on Record, to hinder the Court from giving Judgment. And if the Trial was lawful, the Judgment thereupon must be as lawful, for otherwise it would be in the Power of a Person by putting in an Appeal to render the Verdict ineffectual, which is contrary to the Words and Intent of the Statute; for suppose [92] the Conviction had been for Murder, the Indictment being well commenced and proceeded upon, the subsequent Appeal cannot obstruct Judgment, but the Court ought to condemn the Prisoner, otherwise the Statute of 3 H. 7. is not observed, which requires not only a Proceeding on the Indictment, but a Determination: And the Statute would be as little observed

² Hawk. 527.

¹ The contrary of this Doctrine seem to be holden by Coke.
3 Inst. 131.

observed if Judgment should be respited upon the Conviction of Manslaughter as upon a Conviction of Murder.

² Hawk. 527,
528.

³ Inst. 131.
S. C.

Stanley's Case.

3. By the Common Law no Conviction or Acquittal could be avoided by an Appeal interposing before Judgment: but though Judgment was respited, the Defendant in the Appeal might plead the Acquittal or Conviction had in Bar to the Appeal, *St. P. C.* 106. 16 *E.* 4. 11. 45 *E.* 3. 25. 4 *Rep.* 45. *Wrote and Wigges*; against which there are but two Cases, *viz.* 17 *Aff. p.* 1. which are contradicted by the Opinion and Observation of *B. tit. Appeal* 55. that declares the Common Law to be contrary until 3 *H.* 7. The other is *Dyer* 296. *p.* 20. which is so very strange, that it cannot amount to the least Authority. That Case was, *viz.* One indicted of Murder was convicted at the Gaol Delivery of *Newgate*, and before Judgment given the Wife brought an Appeal; to which the Defendant pleaded, that she had taken another Husband in a Foreign Country. The Matter resting about a Year, the Indictment was removed in *B. R.* and the Party convicted called to Judgment upon the Indictment, and he pleaded the Appeal depending; to which *Nul tiel Record* was pleaded; but afterwards the Plaintiff in the Appeal was non-suited, and then Judgment of Death was given against the Defendant. *Observe*, That Case is left with a *Quare*, and so no judicial Determination as to this Point, saving that the Man was hanged.

1. The Court gave no Opinion concerning the sufficiency of the Plea.

2. It doth not appear how the Plaintiff became Nonsuit.

For

[93] For there was not any Opportunity for it, therefore it was irregular; for the Plea was discontinued by the *Certiorari*; for all Removals of Causes upon *Certiorari*'s determine the Plea; therefore that Case is no Authority, but only an History of what was done; for the Man was well condemned and executed upon the Conviction, and those Scruples then made were very unnecessary.

For which Reasons the Court did arraign *Lisle* upon the Conviction of Manslaughter, and he demanded his Clergy; which being allowed to him, he read as a Clerk, and was burnt in the Hand.

Armstrong versus Lisle.

Mich. 8 W. 3. Rot. 565.

IN the Appeal of Murder before mentioned, the Defendant sued out a *Scire facias* against the Plaintiff to prosecute his Appeal, returnable *Quinden' Pasch'*; at which Day the Plaintiff appeared, and by his Council at Bar did arraign the Appeal. It being prayed that the Defendant might answer thereunto, the Defendant pleaded the Indictment, and Conviction of Manslaughter at the Assizes, which was removed into the *King's Bench*; and that no Judgment was thereupon given; and that at the Time of the Conviction he was, and yet is a Clerk; and then prayed his Clergy, and offered to read as a Clerk if the Court would have admitted him thereunto; and that afterwards, on *Monday post Crastin' Pur' Beatae Mariæ Virginis* last, being demanded by the Court why Judgment should not be given against him,

2 H. P. C. 390.
2 Hawk. 527,
528.

him, he demanded the Benefit of Clergy; which being allowed to him, he read as a Clerk, and was burned in the Hand *pur per Recordum, &c.* with the usual Averments. And as to the Felony and Murder pleaded *Not Guilty*. To which Plea the Plaintiff [94] made a frivolous Replication, and the Defendant thereunto demurred.

2 Hawk. 527,
528.

The Question was, whether this Plea was a good Bar to the Appeal? And it was resolved by the whole Court, that the Defendant being convicted of Manslaughter, and allowed the Benefit of Clergy, and reading as a Clerk, did bar the Appellant of his Appeal of Murder. And though the Reasons given in the former Case may be sufficient to justify this Resolution; yet many Things may be fit to be added for further Explication of this Matter, which hath for a long Time been in much obscurity, and laboured under very great variety of Opinion.

2 Hawk. 527.

I. The Conviction or Acquittal upon an Indictment of Murder or Manslaughter was at Common Law, a good Plea in Bar to the Appeal. For the Proceeding upon the Indictment may be Legal, though the Appeal was then pending; and if the Party convicted should have had Judgment of Death given against him if he was no Clerk, there is the same Reason he should have the Benefit of the Conviction and Clergy if he were a Clerk. The like if he be acquitted; for if convicted he should suffer Death, therefore if acquitted he should be discharged.

2 Hawk. 527.

To the Authorities before cited, these may be added, *F. N. B.* 115. *b.* where an Appeal of Murder was depending, if within the Year and the Day, the Justices of Gaol Delivery did proceed to try the Appellee upon an Indictment of Murder, and he was acquitted,

acquitted, he might have a Writ of Conspiracy, though he was not tried upon the Appeal; which could not have been maintained unless the Acquittal upon the Indictment had been a perfect and absolute Discharge of the Offence, 21 *H. 6.* 28. *Fitz. tit. Conspiracy* 6. 7. *H. 4.* 35. *Hale* 244. That an Acquittal upon an Indictment is a good Bar to an Appeal of Murder. The reason whereof is more strong in the Case of an Appeal of Death than in any other Appeal, *to wit*, of *Robbery* or *Larceny*, (in which an Acquittal upon an Indictment would be, and is to this Day, a good Bar) *St. Pl. Cor.* 106. [95] For the Appellant seeks only Revenge for the Death of his Ancestor, without regard to the Publick: But in an Appeal of *Robbery* or *Larceny*, he is to have Restitution: but if a Person be murdered, the King prosecutes to have an Example of Justice made for the Safety of all his People; besides, the King is more concerned in Interest, being to have the Forfeiture of all the Goods and Chattels of the Offender, and the Year, Day, and Waste of his Lands.

And though the Prosecution at the King's Suit was frequently delayed for the Benefit of the Parties Appeal, yet that was not *ex provisione Legis*, but merely by the Discretion of the Judges, for the more effectual Prosecution of the Offender, by encouraging the Persons who were most concerned, and therefore were thought to be most zealous therein. This appears by *St. Pl. Cor.* 107. *Fitz. tit. Coron.* 44. 22 *E. 4.* when the Justices did agree, that that course of delaying to proceed on the Indictment within the Year should be observed, for the sake of the Parties Appeal, which was frequently practised before, but not

Sum.

2 Hawk. 523.
2 Hawk. 527.

Sum. 245.
2 Hale P. C.
251.

not so firmly established until then. *Hale Pl. Cor. con.* fo 40 *Aff. p.* 40. But the Mischief thereof being in some few Years perceived, occasioned the making the Statute of 3 *H.* 7. which abolished that Liberty which the Judges took, and obliged them to proceed upon the Indictment at any Time within the Year, and upon no Account to tarry for the Appeal; and to encourage that Proceeding, saves the Benefit of the Appeal, notwithstanding the Attainder or Acquittal, except when Clergy was had; for that Exception is to the Purview of the Statute, and shews what the Law was before, *viz. That when Clergy was had upon a Conviction or Attainder of Murder upon the Indictment, it was a good Bar of the Appeal before the Statute.*

2 Hawk. 523,
527.

It is most true, that if an Appeal was freshly brought, and pending before the same Justices before whom the Appellee was indicted, the Court ought to proceed rather upon the Appeal than the Indictment, because of the Interest of the Appellant, who in Case of Robbery ought to have Restitution, which upon an Indictment before 21 *H.* 8. he could not have; and in an Appeal of Death the Wife or heir might have Execution upon the Judgment (notwithstanding any Pardon) in Revenge of the Injury done to her or him: And the preferring the Appeal then pending, to the Indictment, was no hurt to the Publick Justice of the Kingdom; for if the Appellant was nonsuited, or did release either before or after Attainder, the Prosecution was devolved to the King, who might cause proceeding to be upon the Appeal, and Execution to be had upon the Judgment. But at the Common Law, if there was a default of fresh Suit, the Appeal was lost, if the Defendant did plead it in Abatement. *Vide Stat. Glouc. cap. 9. Brañ. lib.* [96]

lib. 3. 139¹. 2 Inst. 329. Qui appellare voluerit, debet ille cui injuratum fuerit, tam cito quam poterit, Hutesum levare, &c. Therefore by such a neglect of fresh Suit, the Prosecution belonged to the King to proceed by way of Indictment. But in that Case the Appellee, upon an appeal commenced against him, could not take advantage of the want of fresh Suit, unless he had pleaded it. And in an Appeal of Robbery or Larceny, though the Defendant did not plead in Abatement the want of fresh Suit, but was thereupon convicted, yet the Appellant could not have Restitution unless the Jury did find fresh Suit.

But great Question hath been made, what should be accounted a fresh Suit? *Vide St. Pl. Cor. 165, 166.* where, upon Consideration of all the Books, it is settled, *that it is not capable of any certain Definition, but must be determined by the Discretion of the Justices.* Now if the Party robbed, be not as ready to prosecute his Appeal, before the Justices of Gaol Delivery, as the King's Officers are to prosecute an Indictment, and the Offender be in Gaol; or if the Party shall chuse rather to Prosecute upon the Indictment; this is a neglect of the Appeal, and a default of fresh Suit, so far as to vest the Prosecution in the King; for though it is very reasonable to prefer the Appeal to the Indictment, yet there can be no Reason to defer the King's Prosecution by any affected delay in the Party that should bring his Appeal. Therefore, if at any Time the Court did proceed upon an Indictment, when an Appeal was depending; it must be presumed, that the Person injured was negligent or remiss in the Prosecution of the Appeal, or that the Appeal was convenously brought

² Hawk. 523, 527.

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¹ Britton fol. 43 accord.

brought to obstruct the King's Prosecution, which is the same in Judgment of Law, as if none was brought at all, or that the Party did choose to proceed upon the Indictment rather than the Appeal. And therefore at the Common Law in case of Death, and then, and now, in that of all other Felony, if one were tried and acquitted upon an Indictment, if the Person injured did bring his Appeal, and the Defendant did plead his acquittal, the Appellant could not reply that he brought his Appeal by fresh Suit; for that would be to arraign the Justice of the Court in a matter that is left to be tried by Examination; and to be determined by the Justices, for the Appellant might bring his Appeal conveniently, or if really, chose rather to proceed upon the Indictment.

2 Hawk. 523,
527.

Obj. But there is an Objection that seems plausible, which is, that before the Statute of 3 Hen. 7. the Court was obliged by Law, not to proceed upon the Indictment of Murder within the Year and a Day; for though at Common Law, the Appellant was to make fresh Suit; yet the Statute of *Glouc. chap. 9.* hath given a Year and a Day to the Appellant to bring his Appeal, which is instead of fresh Suit: And therefore where there was fresh Suit, the Court ought rather to proceed upon the Appeal, than upon the Indictment. And since the Party hath a Year and a Day to bring his Appeal, there can be no default imputed to him until that Time be expired.

2 Hawk. 523,
527.

Resp. To this I answer. First, that the King, as to his Prosecution is not obliged by any Words in the Statute, but only the Defendant, if the Appeal be brought within the Year, is disabled to plead in Abatement thereof the want of fresh Suit. For the Statute was made for the advancement of Justice; but

[98]

but if there should be such a Consequence deduced from it, that the Defendant could not be tried upon the Indictment within the Year, it would tend much to the delay of Justice.

Resp. 2. Secondly, it appears, not only by all the Books before mentioned, that the not proceeding upon the Indictment was only an Agreement among the Judges themselves; but the recital of the Statute of 3 H. 7. doth not mention that, that delay was by Law; but only that it was used to tarry.

2 Hawk. 523,
527.

Resp. 3. Thirdly, That Agreement of the Judges plainly shews, that if the Defendant had been tried and acquitted or convicted, that would have been a good Bar to the Appeal, otherwise that delay was to no Purpose.

2 Hawk. 523,
527.
2 Hawk. 526.

Resp. 4. Fourthly, the Defendant in the Appeal could not hinder his being tried upon the Indictment, for he could not plead the Appeal depending, either in Bar, or in delay of the Trial, 43 E. 3. 25. a. 31 H. 6. 11. Now, if he was tried and acquitted upon the Indictment, and yet should be liable to the Party's Appeal, his Life must be twice in Jeopardy; so that though the Judges did do an Injury to the Appellant in trying the Prisoner upon the Indictment, either within the Year, or pending the Appeal, (which is not to be supposed) yet that ought not to affect the Appellee, who could not prevent his being tried.

2 Hawk. 498,
523-527.

It is in the next Place to be considered, whether the Court can delay the allowing of Clergy, to a Prisoner convicted of a Crime within the Benefit of it. And if the Court should respite the Allowance of Clergy, what the Consequence would be.

The Court ought not to delay the Party having the Benefit of his Clergy; for it is his Right, if he
be

be capable of it.¹ *Hob.* 289. *Searle* against *Williams*. First, it may not be improper to enquire [99] how his Right of having Clergy did commence. Secondly, how Laymen came to be entitled to it. This Right began by an Encroachment of the Pope upon the Temporal Power, in the Behalf of the Clergy; whom the Pope by his Ecclesiastical Constitutions did as much as in him lay, exempt from the Jurisdiction of Lay Judges. Therefore, though the whole Body of the Clergy stood upon it, as appears by *St. Ar. Cler' C.* 15. that *Clericus coram Seculari Judice judicari non debet* in case of Life or Member; yet the Temporal Courts did not wholly yield to this Imposition, but only in Part, and qualified it in a great Measure.

² Hawk. 470.
² Inst. 633.

² Hawk. 499.

1. They would indict Clerks for Felonies and Crimes, as well as others, and proceed thereon, until the Ordinary did demand them. And if the Ordinary would not demand them, antiently, the King's Courts took no Notice of them; but would proceed to Conviction, Attainder and Execution. And if the Ordinary did claim Clerks before Conviction, then an Inquisition was taken, whether the Party was Guilty or not, *ut sciatur qualis Ordinarius debbetur*; and if acquitted, discharged; but if found Guilty, then delivered to the Ordinary, who was to proceed to Purgation. This Privilege so restrained and ordered, was confirmed and established by the Statute of *W. 1. cap. 2.* and thereby became

² Inst. 163.

¹ Though the Judges made it a Rule not to admit any one to Clergy, until after he had pleaded; yet I find it no where holden that a Man could not legally demand it until called to Judgment; Nor doth the Opinion to the Contrary, in the principal Case, grounded on the Authority in *Hobart*, seem to be at all made out by that Case. ² Hawk. 498, 528.

became an undoubted right to all Clerks; which was confirmed and allowed by divers Acts of Parliament since. But then the Ordinary was to proceed to deprive the Clerk of his Character, if he could not purge, whereby he became a meer Layman: For though at first the Clergy never intended that any should have that Privilege, but those who were in Holy Orders; yet afterwards they extended it to those who were not strictly in Orders, but were Assistants to them in doing Divine Offices. See *Linwood* 92. That they should have the Privilege of Clergy, who had but *primam tonsuram*, which for the Purpose was the Clerk that sung or set the *Psalm*, who was comprehended under the Word *Clericus*, *Linwood* 17. So was the Door-keeper of the Church or Chapel, the Reader, Exorcist, Sub-Deacon, which because the Temporal Courts did not readily allow, occasioned the Complaint of the Clergy, as appears by the Statute in 25 E. 3. cap. 4. That *Clerks Seculars, &c.* had been drawn and hanged, by the award of secular Judges; in prejudice of the Franchizes, and in Opposition to the Jurisdiction of Holy Church. Therefore it was granted by the King, that all manner of Clerks, as well secular as Religious, which should be convicted before secular Justices, should have that Privilege; which Word Clerk in that Statute hath reference to the Canon Law, and being made to establish a Privilege claimed thereby was expounded by it, which included all that were of those inferior Orders. And from thence it is to be observed, Occasion was taken in after-times to alter the Method of allowing Clergy, for at the Common Law, if the Party had not demanded his Clergy before Conviction, he lost it,

2 Hawk. 499. It, *St. P. C.* 151.¹ *Prisot* Chief Justice of the *Common Pleas* in the Time of *H. 6.* made an Alteration, and would direct the Party indicted or appealed to answer to the Felony, and after Conviction upon his Demand allow him his Clergy, which Course has been ever since observed, being grounded upon the said Statute of 25 *E. 3. St. 3. cap. 4.* that allows it to Clerks after Conviction.

2 Hawk. 470. Now the next enquiry will be how meer Laymen, who had no Relation to any Ecclesiastical Employment came to enjoy this Privilege. It is to be known that in those Days few were bred to Literature, but those who were actually in Orders, or educated for that Purpose. And therefore the way of Trial whether one was a Clerk or no was by reading, of which the Court was Judge, and not the Ordinary; for if he could not read, the Court would not deliver him as a Clerk, though the Ordinary did claim him. And if he did read, he should be allowed as a Clerk, though the Ordinary refused him. See *St. Pl. C.* 131, 132. where the Books are quoted, the variety of Opinions considered, and the Law settled. And reading being the Way of Trial, whether a Man were a Clerk or not, without further Examination into any other Qualification, all Persons that so approved themselves by reading were allowed to be Clerks, which is an equitable Construction of those Statutes, that established and extended that Privilege, because they were tried and found by their reading to be Clerks. [101]

2 Hawk. 470. And further, the allowing Clergy to Lay-men that could read, seemed very much in Favour of the Clergy, in preserving its Succession, by exempting such

¹ In some editions 131.

such who were capable of receiving any Orders, when there was occasion for their Service: For though Men were never so well qualified for being Clergymen; yet by the Canon Law, which is still in Force, they were not to receive any Orders, until a Place was provided for them; which favourable Construction of the Statutes in not confining the Benefit of Clergy to those who were actually in Orders, but who were capable of them, received constant Approbation and Allowance. See 4 *Hen.* 7. *cap.* 13. that enacts, that every Person not being within Holy Orders, that once had the Benefit of his Clergy, should not be admitted to it any other Time. And the like Act was made 4 *Hen.* 8. *cap.* 2. which for Murders, Robberies &c. excludes all Persons from the Benefit of his Clergy, (Clerks in Holy Orders excepted;) which gave much Offence to the Clergy, because the Construction of the Words Holy Orders, was confined to the greatest Orders, as Deacon and Presbyter, excluding not only Lay-men, but all the inferior Orders, whose Orders are not accounted sacred. See *Linwood* 92. for they had only *primam Tonsuram*, which caused the Abbot of *Winchcomb* in his Sermon at *Paul's Cross* to inveigh against that Act; and to avoid the Force of it against those of the inferior Orders, the Clergy insisted, that *tam minores quam majores Ordines fuere sacri*. See *Keil* 180. the whole Debate of that Matter.¹

[102] That Lay-men, that could read, ever had the Privilege of Clergy since 25 *E.* 3 doth appear without contradiction by our Books, which allowance never was condemned in Parliament, or complained

¹ Pl. 5.
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plained of as a Grievance; but rather approved of. And the Statute of 18 *Eliz. cap. 7.* being made, extends to all Persons, that at that Time were admitted to the benefit of Clergy and used to be delivered to the Ordinary; whereby every Person, as well Lay, as Spiritual, hath a right to the Benefit of that Statute for the first Offence, in the same Degree as Clergymen in the greatest Orders had before. The Statute enacts that.

2 Hawk. 504,
505.

1. One that shall be admitted to the Benefit of his Clergy, (which is, every one that demands it and Reads) shall not be delivered to the Ordinary: But after reading, and burning in the Hand shall be delivered; which amounts to, and hath the same effect as a Purgation before. *Vide 5 Rep. 109. Foxley's Case.*

2 Hawk. 505.

2. If the Offence be heynous, the Court in Discretion may inflict any other Punishment, not exceeding a Year's Imprisonment; whereby there is no room left for the Court to exclude him from the Benefit of his Clergy, upon which his Discharge depends. And if it be so heynous, the Court ought to proceed regularly and give him that additional Punishment, that the Law doth direct after Clergy had. So that the Court is bound up to that Manner of Proceeding, which the Statute hath prescribed; but to remand him to Gaol without doing either, is without any Warrant, Rule or Method in Law, and contrary not only to 18 *Eliz.* and 3 *Hen. 7.* but to the 25 *Ed. 3.* In the recital whereof, complaint was made that Clerks being attainted, were remanded to Gaol upon a Suggestion that other Matters were against them; yet the Law was, that those Clerks should not be remanded to Gaol, but presently arraigned of all against them, otherwise immediately delivered

delivered to the Ordinary, so that he ought not to be kept longer than the same Session or Gaol Delivery, though he was indicted for other Crimes. *Vide St. Pl. C. 152.*¹

[103] It is not enough to say, *That where there is an absolute Acquittal, he should be liable to the Appeal, therefore much more where he is convicted of Manslaughter, and acquitted of the Murder*; For first, the Statute 3 H. 7. makes him liable in the one Case, ² Hawk. 527. and exempts him in the other.

2. In many Cases a Conviction and having Clergy conduces more to the Safety of the Prisoner than an Acquittal; for if the Prisoner were convicted and had his Clergy, he was thereby discharged of all Crimes committed before Clergy had, until 8 Eliz. c. 4. But if he had been acquitted, he was liable to answer for any others committed before his Acquittal, *Dyer* 214.² 1 And. 114.³ And though the Clergy be taken away from Murder, with which he is charged in the Appeal, yet that makes no Alteration; for Manslaughter is the same Offence, only differing in Circumstance and Degree; and at the Time of the making the Statute of 3 H. 7. Clergy might be had for the one as well as the other; and the subsequent Statutes of 23 H. 8. and 1 Ed. 6. have not that Effect as to hinder him from having his Clergy for any Offence for which he was not excluded from it. For it would be very strange that the 23 H. 8. c. 1. and 1 Ed. 6. c. 12. should have those Consequences, *first*, by taking away Clergy for Murder, to hinder one from the Enjoyment of it that is only found guilty of Manslaughter, though appealed of Murder;

² Hale P. C. 251.
Holcroft's Case.
⁴ Rep. 46.
Co. Ent. 55.
³ Inst. Cap. 57, page 131.
² Hawk. 527.

¹ In some editions 132.

² Pl. 48, 49, 50. Stone's Case.

³ Pl. 158.

Murder; and *secondly*, to put a Man upon another Trial for his Life, when he was before in Danger of it, which is contrary to the Maxim of the Common Law. 4 Rep. 45. *Vaux's Case*.

3. To suspend the Allowance of Clergy, is to take away a Man's Defence, whereby he might prevent the being convicted of Murder, which Conviction deprives him of his Clergy; for, notwithstanding these Statutes of 23 H. 8. and 1 Ed. 6. if a Man had been convicted of another Manslaughter or Larceny, and had his Clergy, he might have pleaded that Conviction and Allowance of Clergy in Bar of an Appeal or Indictment of another Murder committed before Clergy had, though ousted of Clergy if convicted, *Dyer* 214. and 8 *Eliz.* The recital of the Statute shews that the Law was so, till altered by that Statute, which by no Construction can extend to this Case, because it is the same Offence. [104]

2 Hawk. 529.

The Statute of 3 H. 7. is severe in overthrowing a Fundamental Point in Law, in subjecting a Man that is acquitted, to another Tryal, which is putting his Life twice in Danger for the same Crime; therefore the Purview of 3 H. 7. ought to be taken strictly, and the Exception favourably.

1. Because that Exception preserves the ancient Right that a Man had, and the Benefit of Clergy hath been always extended upon the Construction of any Act of Parliament made for the Preservation of it: Therefore the Construction 25 E. 3. is, *that as soon as ever a Man is recorded to have read, he is immediately the Ordinary's Prisoner, though remanded to the Gaol, and the Temporal Court hath nothing more to do with him.* St. Pl. Cor. 102.¹

2. It

¹ In some editions 132.

2. It is such a Privilege, of which no general Words in an Act of Parliament have been construed to deprive an Offender: Therefore, if a Fact be made Felony by a Statute wherein are these express Words, *viz.* *That the Offender shall suffer Pains of Death*, as in the Statute of 1 Jac. for *Polygamy, &c.* yet the Offender shall have his Clergy. *Vide* 3 *Inst.* 73. and many other Instances.¹

3. Though the Appeal be attached in the Appellant, yet the Conviction of Manslaughter upon an Indictment, pending the Appeal, and Clergy allowed, will be a good Bar thereunto. *Vide* 4 *Rep.* 47. ^{3 Inst. 131.}
Wrote and Wigg, which hath these words, *viz.* *If before Plea pleaded he hath his Clergy, &c.* which must have this Construction, *viz.* *If the Appeal be in the same readiness to be tried as the Indictment, then it ought to be preferred to it; but if not, the Indictment may be proceeded upon, and the Conviction of Manslaughter with Clergy will be a good Bar to the Appeal.* ^{2 Hawk. 527.}

[105] 4. It is fit to consider what the Consequence would be to the Defendant in Appeal of Murder, if he had been convicted of Manslaughter, and the Court should not call him to Judgment, whereby he could not have the Opportunity of demanding the Benefit of his Clergy, which he is not to have without demanding it, *Hob.* 189.² *Searl and Williams*, or at least if he demanded the Benefit of his Clergy, and no Record made of it: ^{3 First,} it would be an apparent Injury done to the Public Justice of the Kingdom,

¹ Stone's Case, ub. sup.

² See *Hob.* 289.

³ This Opinion, grounded on the Authority of *Searl's Case*, does not seem to be at all made out by that Case. ^{2 Hawk. cap. 36. l. 14. p. 528,} and the reasoning contained in that Section of *Hawk.* is sanctified by the Approbation of Lord Mansfield. ^{5 Bur. 2801.}

dom, in not proceeding to Judgment upon a Conviction, unless there be some reason in point of Law appearing upon that Record of Conviction that may justify the Court to advise and consider. 2dly, It would be a great absurdity to try a Man in order to hang him, and yet if the Verdict be such that he may be saved, he shall be deprived of the Advantage thereof, which is to subject the Life of a Man to the arbitrary Disposition of the Court, though there be a Law by which he might be saved. But this delay of the Court shall never turn to the Damage of the Prisoner; for if he be a Person capable of having his Clergy, he may plead the Conviction of Manslaughter upon the Indictment, and that he was a Clerk, and was ready to have prayed his Clergy in Bar of the Judgment, and that the Court, without giving him an opportunity to demand his Clergy, did remand him to Gaol; for the Delay or Doubt of the Court, notwithstanding there might be Cause of Doubt concerning it, shall not prejudice the Party, 4 Rep. 45, 46. *Burgh* and *Holcroft's* Case is full in Point: There the Party was called to Judgment, and did pray his Clergy, but the allowance thereof was respited by the Court upon a *Curia advisari vult*; yet it was as effectual to him, and allowed to be as good a Plea in Bar to an Appeal of Murder as if it had been allowed to him, because the respiting of it was the act of the Court. It would be wonderful strange, that the delay of the Court in one Case shall not be a damage to the Party, and in the other it should. The not calling him to Judgment is as much the delay of the Court in one Case, as the respiting the Clergy in the other; both are as much without the Letter, and within the same Equity of the saving in the Statute.

These

[106] These Matters seem to make this point very clear; and being so obvious, it is a great wonder that ever any question should be made of it; yet it is most certain that *Tothill, Yardley, & al'*, were in 18 Car. 2. tried in *Kent* before the Lord Chief Justice *Bridgeman* for a Murder, and convicted of Manslaughter, and he refused them the Benefit of Clergy; upon which an Appeal was brought in the King's Bench, and the party pleaded *Not Guilty*, and were tried again, *Kelyng* then Chief Justice, *Twisden, Wyndham*, and *Morton*, Justices. Whether they were acquainted, with the deferring to proceed to Judgment at the Assizes, and did approve of it, doth not appear.

1 Sid. 316.
2 Kib. 141, 3.
S. C.

Since then there have been divers other Cases, which in the last Reign were resolved by all the Judges of *England*, That the Court might delay the calling the Convict to Judgment, to hinder him from praying his Clergy; especially if any Appeal were depending before it was allowed, in order to make the Defendant liable to the Appeal. One was the Case of *Goring and Deering*, where the Defendant pleaded his Conviction of Manslaughter upon an Indictment, That he was a Clerk, and ready and desirous to have his Clergy, if the Court would have called him to his Judgment. That Plea was over-ruled, and upon his Plea over, *Not Guilty*, he was tried before me, *Pschb.* 1 *W. & M.* at *Nisi Prius* in *Middlesex*, and again convicted of Manslaughter, and the burning of his Hand was pardoned. I did not hear the Reasons of that Judgment, but I suppose that Precedent of *Tothill* and *Yardley*, which was made by so great a Man as my Lord *Bridgeman*, who possibly might do it only to have the Point solemnly settled and determined, and some other subsequent instances in pursuance thereof, did prevail: But notwithstanding what had

2 Hawk. 528.
Trim. 15.
3 Mod. 156.
Carth. 16.
Comb. 89.
2 Show. 507.
S. C.

had been so practised, and afterwards so solemnly resolved, we did, upon the Reasons before mentioned, resolve, *That the Defendant Lisle's Plea to the Appeal was a good Bar*, and gave Judgment for the Defendant.

From the Matter of this Debate may be drawn [107] these four Conclusions :

1. If one be indicted for Murder, and thereupon convicted of Manslaughter, and the Court will not call him to Judgment, but continue him over to another Gaol Delivery, upon a *Curia advisare vult de Judio*, &c. if an Appeal of Murder be brought, he may plead his Conviction, and his being a Clerk and ready to read if the Court would have allowed him.

2. When the Indictment and Conviction of Manslaughter and Appeal are removed into the King's Bench, that Court is bound *ex officio*, to call the party to Judgment, and if he pray his Clergy, to allow it to him, and order him to be burnt in the Hand.

3. When at the same Sessions or Assizes there is an Indictment and an Appeal depending, it is most just to proceed upon the Appeal, if the Prosecutor desires it, and the Court in Justice is obliged thereunto ; because the *Stat. 3 H. 7.* doth not forbid it, for the Words are, *That there shall be no tarrying for the Appeal* ; but if the Appeal be ready, it ought to have the preference : Yet if the Court should proceed to try the Prisoner upon the Indictment, before he be tried upon the Appeal, and he be convicted of Manslaughter, and hath his Clergy, it will be a good Bar to the Appeal ; for there may be a just Cause for the Court to prefer the Indictment to the Appeal ; as, if the Court shall find that there is like to be a feint

2 Hawk. 527,
528.
But vide 3 Inst.
131.

feint or a covenous Prosecution of the Appeal ; in order to acquit the Party ; for the Interest of the Crown, and the sake of Publick Justice, the Court ought to try the Prisoner upon the Indictment rather than upon the Appeal, for otherwise the Acquittal upon a feint Prosecution will conclude the King.

[108] 4. If upon an Indictment of Murder the Party is convicted of Manslaughter, and immediately after, at the same Gaol Delivery, the Wife or Heir of the deceased shall put in an Appeal, it is most just for the Court to call the Convict to Judgment upon the Indictment, and to allow him his Clergy, before he be put to answer to the Appeal, and then he may plead the Conviction and Clergy in Bar of the Appeal ; for though it be the same Sessions, and the Appeal hath relation to the first Day of the Sessions as well as the Indictment, yet there being a Record of a proceeding upon the Indictment it is pleadable in Bar, and may be averred to be the same Day before the Appeal commenced ; or if the Appeal be commenced before the Trial, if it appears to the Court the Conviction was before Plea pleaded to the Appeal, it is sufficient : For, suppose a Man is indicted of Murder, and tried, and convicted of Manslaughter, or acquitted, and at the same Sessions or Assizes there is a Coroner's Inquest, he may plead his former Acquittal or Conviction in Bar of the other ; though the Course now used to prevent that Trouble, is to charge the Jury with both Inquisitions at the same Time, yet anciently it was otherwise ; and if the Court will not allow the Convict of Manslaughter his Clergy, he may insist upon it before he answers to the Appeal.

154 *Armstrong versus Lisle.*

Note, These Reasons were not solemnly delivered in Court, but afterwards were put in order and form by the Chief Justice.¹

¹ Sir John Holt, who was the original Editor of these Reports.



TERM.



[109]

TERM. PASCH.

13 W. 3.

Rex versus Plummer.

12 Mod. 627.
S. C.

Coram Rege inter placita Coronæ Rot. 25.

PLUMMER the Prisoner was indicted at the Assizes held for the County of Kent, 29th of July, 12 Will. 3. The Indictment sets forth that *John Glover*, and *Benjamin Plummer* the Prisoner, and others, 13 March 12 Wil. 3. did of Malice forethought make an Assault upon *John Harding*, and that *John Glover* having a certain Fuzee in his Hand charged with Gunpowder and Bullet, did feloniously, voluntarily and of his Malice forethought, discharge the same against the said *John Harding*, and thereby gave him a mortal Wound of which he instantly died. And that *Benjamin Plummer* the Prisoner and others of their Malice forethought, did aid, abet and assist the said *John Glover* in committing the Murder aforesaid. *Benjamin Plummer* pleaded *Not Guilty*, and the Jury did find this special Verdict, viz.

That

That *Joseph Beverton* was duly appointed to seize and apprehend all such Wool of the growth of this Kingdom, that should be carried to be transported into Parts beyond the Seas, and also all such Persons as should carry the Wool in order to be transported. And that *Benjamin Plummer*, *John Harding*, and others whose Names are unknown, to the Number of eight Persons, the said 13 of March about 12 of the Clock at Night, about 7 Miles from the Sea, did load three Horses with eight Hundred Pounds of Wool of the growth of *England*, in order to transport it into France. And *Joseph Beverton* having Notice thereof, came with divers other Persons to his assistance, to a certain Lane about 7 Miles distant from the Sea, in order to stop and seize the Wool so intended to be transported, and placed themselves in divers Places about the Lane; and *Joseph Beverton* with his Company hearing the three Horses laden with Wool, pronounced a Watch Word agreed on between him and his Assistants; and thereupon all of them used their utmost endeavour to seize the Wool, whereupon one of the eight Persons in company with *Benjamin Plummer*, whose Name is unknown, did shoot off the Fuzee, and thereby did kill the said *John Harding*, being one of the eight Persons, and a Partner with them in that Design of transporting the Wool, of which Wound he died. [110]

The Question is upon this special Verdict, Whether *Benjamin Plummer* be guilty of the Murder as charged in the Indictment, or so much as of the Death of *John Harding*.

To put the Case in as few Words as may be, so as to bring it to a Point, it is no more than this. Eight Persons had loaded a quantity of Wool to carry

carry it to be transported; of which the King's Officers having Intelligence, did in the Night time, as they were carrying the Wool, meet to oppose, and to apprehend them, and they met in a Lane, and upon a Watch Word given by the King's Officers, one of the eight Persons shot off a Fuzee, and killed another of the eight Persons, whether the others of the Eight (besides him that shot off the Gun) be guilty of the Murder of the Person slain?

[111] Upon this Question all the Judges have been consulted, and we are all of Opinion, that *Benjamin Plummer* is not guilty of the Murder of *John Harding*. The Reasons of the Judgment were given by the Chief Justice.

1. It doth not appear by the finding of this Special Verdict, that *Glover* or the Person unknown that shot off the Gun, did discharge it against any of the King's Officers but it might be for ought appears for another Purpose; though upon the particular circumstances in the Special Verdict, there is an Evidence that the Gun was discharged against the King's Officers, and so it might reasonably be intended, considering they were all armed, and in Prosecution of an unlawful Act in the Night, which they designed to justify and maintain by Force; especially when the Gun was shot off upon the Watch Word given, the King's Officers were endeavouring to seize the Wool; the Jury thereupon might well have found that the Fuzee was discharged against the King's Officers; but since they have not found that Matter, we are confined to what they have found positively, and are not to judge the Law upon Evidence of a Fact, but upon the Fact as it is found. 2 Hawk. 622.

Therefore it is fit to consider in this Case, 1. What Crime

Crime it is in the Party that shot off the Gun that killed *Harding*.

2. How far the rest of his Company that were with him shall be concerned in the Guilt of it.

Foft. 261.

1. He was upon an unlawful Design, and if he had in pursuance thereof discharged the Fuzee against any of the King's Officers that came to resist him in the Prosecution of that Design, and by Accident had killed one of his own Accomplices, it would have been Murder in him. As if a Man out of Malice to *A.* shoots at him to kill him, but misses him and kills *B.* it is no less a Murder than if he had killed the Person intended. *Dyer* 128.¹ *Crompt.* 101.² *Plowden's Com.* 474. *Saunders's Case*, 9 *Rep.* 81. *Agnes Gore's Case*. [112]

But 2. It not appearing that he discharged his Fuzee against the King's Officer, it may be that he discharged it either out of some Provocation from *Harding*, or wilfully out of some precedent Malice against him.

1. It seems to me hard upon a special Verdict to construe that the Fuzee went off by Accident, but it must be understood to be voluntary; though even in any Indictment for Manslaughter it is requisite that it should be averred that he discharged it voluntarily; but in a Verdict it need not be so alleged, but the saying he did it must be understood to be with, and not against his Will; for where any one upon any killing of a Man is to be discharged by an involuntary killing, it must be so found, without which it must be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his Will, unless it be specially, and

¹ Pl. 60.

² Pl. 474.

and particularly found to be against his Will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by misadventure, the special Circumstances of the Case must be found, that it may appear to the Court to be by accident.

12 Mod. 628.

2. But in the next Place, suppose that he that shot off the Fuzee did it out of Malice premeditated against the Person slain, whereby it would be Murder in him. Then the Question will be, whether the rest of his Accomplices shall be adjudged to be principals to him, as Aiders, Abettors or Assistants to that Murder. And we all held that they would not be Principals: For though they are all engaged upon an unlawful Act, and while they were actually in it, this Murder is committed by one of the Company so engaged, yet it does not appear to be done in Prosecution of that unlawful Act, but it may be upon another Account, and those who are in the unlawful Act, not knowing of the Design that killed the other

12 Mod. 629

[113]

his Companion cannot be Guilty of it. This Notion that hath been received, that if divers Persons be engaged in an unlawful Act, and one of them kills another, it shall be Murder in all the Rest, is very true; but it must be admitted with several Qualifications. First, the Abettor must know of the malicious Design of the Party killing; as for the Purpose *A.* and *B.* having Malice engage in a Duel, *C.* a stranger, of a sudden takes part with *A.* who kills *B.* it is but Manslaughter in *C.* because he knew not of the Malice, though it be Murder in *A.* 14 Jac. Sir *Ferdinando Cary's Case*, *Plow. Com.* 101. *Crom.* 23.

1 Hawk. 101.

If divers Men lie in wait to beat a particular Person, and one of them, while they are in Prosecution of that unlawful Design, out of Malice he had to another of his Companions, finding an Opportunity, kills

kills him, the Rest are not concerned in the guilt of the Fact.

At the Sessions of the *Old Baily*, December 1664. The Case upon the Evidence was, that the Secretary of State made a Warrant to apprehend divers suspected Persons, which was directed to a Messenger, who having Notice that they were in an House, desired several Soldiers to assist him in the apprehending of them, but in the doing thereof they broke open the Doors, and some of the Soldiers stole some Goods. It was held that the Warrant then produced was not sufficient to break open the Doors of the House without a Civil Officer. Secondly, though the breaking open the Door was an unlawful Act, of which all were guilty; yet was it Felony only in those that stole the Goods, or knew of the Design of stealing, and consented to it; but not in the others that were concerned in breaking open the Doors: No more in this Case can the Rest of the Company be said to be guilty of the killing of *Harding*, unless they knew of the Person's Design to kill him.

2. The killing must be in pursuance of that unlawful Act, and not collateral to it. As for the Purpose, if divers come to hunt in a Park, and the Keeper commands them to stand, and resists them; [114] if one of the Company kills the Keeper, it is not only Murder in him, but in all the Rest then present, that came upon that Design, for it was done in pursuance of the unlawful Act, 2 *Roll.* 120. *Palm.* 35. the Case of *Wormal* and *Triftram*, and in the other Books before referred to. *Lord Dacre's Case*, *Moor* 86.

But suppose that they coming into the Park to hunt, before they see the Keeper, there is an accidental Quarrel happens amongst them, and one kills the other, it will not be Murder but Manslaughter; and

and in the Rest that were not concerned in that Quarrel it will not be Felony. So if one kills his Companion upon a former Malice, the others will not be concerned in it, therefore cannot be Abettors because strangers to the Design. And that for ought appears might be this Case, for my Brother *Gould* that tried this Cause informs us, that there was some Reason to believe that he that discharged the Fuzee against the Persons slain, did it upon the account that he conceived that the other had betrayed their Design; and no doubt it was Murder in him that shot off the Fuzee, but not in the others unless privy to his Purpose, for it was not done in Prosecution of that unlawful Act; but if he had shot off his Gun against the King's Officers, and by accident had killed one of his own Party, all the Rest of them would have been Abettors and Principals.

Dyer 128. p. 60. This Case is put, *A.* and *B.* are fighting together out of Malice preposed, *C.* comes to part them, and *A.* kills *C.* this is Murder in *A.* and some said in *B.* also, but the major Number were of a contrary Opinion; for though *B.* was engaged in an unlawful Act as well as *A.* yet the killing of *C.* by *A.* was not in pursuance of, but collateral to it, but the killing of *C.* by *A.* was Murder, because he killed one doing his Duty which was endeavouring to keep the Peace; and would have hindered him from killing *B.* against whom he had Malice.

- [115] 3. There is another Qualification of this Rule, that the doing an unlawful Act whereby a Person is slain shall make the killer to be a Murderer, is, that the unlawful Act ought to be *deliberate*. For if it be sudden, as upon an Affray that suddenly falls out, and the Parties are divided amongst themselves and fall to fighting, and one kills the other it is but Manslaughter.

1 Hawk. 101,
Fost. 316, 311.
Ld. Raymond
1296.

Ante, 102.
Fost. 272.

Fost. 135. 311.

9 Co. 65.
Cro. Jak. 279.
Hugh Ent. 144.

slaughter. So if upon a sudden Affray the Constable or other Person comes to keep the Peace, and some knowing him to be the Constable or Person coming to keep the Peace shall kill him, it is Murder in him and all that assisted him in the doing of it; but in others that continue the Affray, and knew not that the Constable, or other Person was coming to keep the Peace, it will be no Crime: For first, though the Constable did come to keep the Peace, it is necessary that the Parties engaged in the Tumult have Notice that he comes for that Purpose, otherwise the killing him will not be Murder, but only Manslaughter in him that kills him, and in consequence no Crime in the Persons that did not know him to be there, and did not contribute towards his death. At the *Sessions* after *Hilary Term*, 17 *Car. 2.* *Tomson* and his Wife were fighting together in the House of *Allen Dawes*, who seeing them fighting, came in and endeavoured to part them, thereupon *Tomson* thrust away *Dawes*, and threw him down upon an Iron in the Chimney which broke one of his Ribs, of which he died; this upon a special Verdict was held to be only Manslaughter, though the Peace was broke, and the Person slain came only to keep the Peace; and it is the same if he had been Constable. But then it was resolved, that if the Constable or other Person come to keep the Peace be killed, it is necessary that the Person that kills him do know, or be acquainted that he came for that Purpose. Therefore he ought to charge them in the King's Name to keep the Peace, for otherwise the Party fighting may think he cometh in aid of the other with whom he is fighting. And *Mackally's* Case doth not oppose this, but agrees with it in the Reason there given, which is in these Words, *viz.* [116]
When an Officer or Minister of the King arrest another
in

in the Name of the King, or requires the breakers of the Peace to keep the Peace in the King's Name; if any notwithstanding resist and kill the Officer, it is Murder; but if he had not Notice that it was the Officer, it is only Manslaughter in him that killed; but then by the same Reason the others that are in the Affray, which was sudden, did continue in the Affray, but did not resist the Constable, it cannot be Murder or Manslaughter in them, for their A& cannot be extended farther than a breach of the Peace.

But suppose the Riot or the Assembly had been deliberate, and they designed doing an unlawful A&, in which they are opposed by the Constable or any other Person, and one kills the Person opposing, it is Murder in all, *Moor* 87. *Dyer* 138. but more distinctly put in *Lamb.* 234. *George* came with divers Persons in a riotous Manner to the House of B. upon the Account of seizing some Goods, and using there some angry Speeches, a Kinswoman of them both travelling indifferently between them to appease them, was suddenly stricken in the Head with a Stone thrown over the Wall by one of the Servants of *George*, whereof she afterwards died, and by much the greater Opinion of the Judges and King's Council, it was held to be Murder in all the Accomplices; and though she came as a Stranger and was indifferent to all, yet they came with Malice against B. and in pursuance, and in Execution of that Riot the Woman was killed. Fost. 351.

4. As the unlawful A& ought to be deliberate to make the killing Murder, so it ought to be such an A& as may tend to the hurt of another either, immediately, or by necessary Consequence. If Persons are in a Riot, and go with offensive Arms, or with Clubs and Staves, and in that Riot one of the Company kills

kills another, it is Murder in him, and in all the Rest that are engaged in the Riot, though but lookers on, *Dal.* 329. *Br. tit. Corone* 171. *St. Pl. C.* 40. *Hale*¹ [117] 51, 57. But if such unlawful Act doth not tend immediately, or by necessary Consequence to the Danger of another, though Death ensue hereby, it is but Manslaughter.

Shooting at a Deer in another's Park is an unlawful Act: If the Arrow glanceth and kills a Man, this is but Manslaughter, which is contrary to 3 *Inst.* 56. that holds it to be Murder: But Lord *Hale* 31.² saith it is but Manslaughter, and the rest of the Company will be Guilty, for they were all Abettors to the unlawful Act.

¹ Hawk. 86.

The Design of doing any Act makes it deliberate; and if the Fact be deliberate, though no hurt to any Person can be foreseen, yet if the Intent be felonious, and the Fact designed, if committed, would be Felony, and in pursuit thereof a Person is killed by Accident, it will be Murder in him and all his Accomplices. As for the Purpose, divers Persons design to commit a Burglary, and some of them are set to watch in a Lane to hinder any from going to the House to interrupt them, if any comes in their Way, and those that are to keep Watch, kill him, those that are sent to rob the House will be guilty of that Murder, though they do not commit the Burglary.

¹ Hawk. 86,
100.
Foff. 258.

So if two Men have a Design to steal a Hen, and one shoots at the Hen for that Purpose, and a Man be killed, it is Murder in both, because the Design was felonious. So is Lord *Coke* 56.³ surely to be understood, with that Difference, but without this Difference,

¹ Sum.

² Sum.

³ 3 *Inst.*

Difference, none of the Books quoted in the Margin, which are 3 *Ed. 3. Corone* 354. 2 *H. 4.* 18. 11 *H. 7.* 23. do warrant that Opinion; nor indeed can I say that I find any to warrant my Opinion, but only the Reason is submitted to the Judgment of those Judges that may at any Time hereafter have that Point judicially brought before them.

[118] These Things I thought fit to mention, though some of them are not such Premisses from which the Conclusion to this Matter in Question may be drawn, yet they all tend to illustrate the Matter and Reason that we rely upon, which is, that though the Person that shot off the Fuzee against the Person slain did it maliciously, and so it would be Murder in him, yet the others not knowing of his Design against that Person cannot be adjudged to be Aiders and Abettors of that Murder.

Secondly, If it had appeared upon the Verdict that the Fuzee had been discharged against the King's Officer, and by accident *Harding*, one of the Company, had been killed, it would have been Murder in the Rest, because it was done in pursuance of that Design, which was deliberate, and in the Prosecution whereof Hurt and Mischief might ensue; and their being together is an Evidence that they did intend to maintain their unlawful Design by Force, and that the shooting the Gun was against the Officer: But this Matter being only Evidence of it, it ought to have been considered by the Jury, but we as Judges cannot take Notice of it.

T E R M.



TERM. HIL.

[119]

5 Annæ Reginæ.

1

Holt. 484.
9 St. Tr. 61.
S. C.

Regina versus Mawgridge.

In the Queen's Bench.



T the Sessions of the Peace held at *Guildhall, London*, on the first of *July*, in the fifth Year of the Queen, *John Mawgridge*, of *London*, Gent. was indicted, for that on the seventh of *June*, in the same Year, he did feloniously, voluntarily, and of his Malice forethought, make an Assault upon *William Cope*, Gent. and with a Sword on the left Part of his Breast, near the left Pap, did him strike and pierce, giving him thereby a mortal Wound, of which he the said *William Cope* did instantly die. Which Indictment being delivered to the Justices of Goal Delivery of *Newgate*, he was arraigned there-upon, and pleaded *Not Guilty*.

The Jury found this Special Verdict.

[120]

That William Cope was Lieutenant of the Queen's Guards in the Tower, and the principal Officer then commanding

commanding there, and was then upon the Guard in the Guard Room; and that John Mawgridge was then and there, by the invitation of Mr. Cope, in Company with the said William Cope, and with a certain Woman of Mr. Cope's Acquaintance, which Woman Mawgridge did then Affront, and angry Words passed between them in the Room, in the presence of Mr. Cope and other Persons there present, and Mawgridge there did threaten the Woman; Mr. Cope did thereupon desire Mawgridge to forbear such usage of the Woman, saying that he must protect the Woman; thereupon Mawgridge did continue the reproachful Language to the Woman, and demanded Satisfaction of Mr. Cope, to the intent to provoke him to fight; thereupon Mr. Cope told him it was not a convenient Place to give him Satisfaction, but at another Time and Place he would be ready to give it to him, and in the mean Time desired him to be more civil, or to leave the Company; thereupon John Mawgridge rose up, and was going out of the Room; and so going, did suddenly snatch up a Glass Bottle full of Wine, then standing upon the Table, and violently threw it at him the said Mr. Cope, and therewith struck him upon the Head, and immediately thereupon, without any Intermission, drew his Sword, and thrust him into the left Part of his Breast, over the Arm of one Robert Martin, notwithstanding the endeavour used by the said Martin to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the Wound in the Indictment mentioned, whereof he instantly died. But the Jury do further say, that immediately, in a little Space of Time, between Mawgridge's drawing his Sword and the giving the mortal Wound by him, Mr. Cope did arise from his Chair where he sate, and took another Bottle that then stood upon the Table, and threw it at Mawgridge,

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gridge, which did hit and break his Head; that Mr. Cope had no Sword in his Hand drawn all the While; and that after Mawgridge had thrown the Bottle, Mr. Cope spake not. And whether this be Murder or Manslaughter, the Jury pray the Advice of the Court. [121]

A day being appointed for the Resolution of the Court, and the Marshal required to bring the Prisoner to the Bar, returned he was escaped; which being recorded, the Chief Justice gave the Opinion of the Judges in this manner :

This Record being removed into this Court, the Case hath been argued before all the Judges; and all of us, except my Lord Chief Justice Trevor, are of opinion that Mawgridge is guilty of Murder.

This hath been a Case of great Expectation.

This Distinction between *Murder* and *Manslaughter* only, is occasioned by the Statute of 23 H. 8. and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepensed, which Statutes have been the Occasion of many nice Speculations.

1 Hawk. 88.

91.

1 H. P. C. 425.
in nota.

The Word *MURDER* is known to be a Term or a Description of Homicide committed in the worst Manner, which is no where used but in this Island, and is a Word framed by our Saxon Ancestors in the Reign of *Canutus* upon a particular Occasion, which appears by an uncontested Authority, *Lamb. 141.*¹ In the Laws of *Edward the Confessor*: *Murdra quidem inventa fuerunt in diebus Canuti Regis, qui post acquisitam Angliam & pacificatam, rogatu Baronum Angliæ remisit in Daciam exercitum suum.* Thereupon a Law was made, *That if any Englishman*

¹ 237 in other editions.

Englſhman ſhould kill any of the Danes that he had left behind, if he were apprehended, he ſhould be bound to undergo the Ordeal Trial to clear himſelf; and if the Murderer were not found within eight Days, and after that a Month was given, then if he could not be found, the Ville ſhould pay forty-fix Marks, which if not able to pay, it ſhould be levied upon the Hundred. *Bracton* 120. agrees with this Account.

[122] Though this Law ceaſed upon the Expulſion of the Danes, yet *William* the Conqueror revived it for the Security of his Normans, as appears by his Laws, after he had confirmed King *Edward* the Confeſſor's Laws. And *Henry* 1. *anno primo Regni*, afterwards by his Law (as appears in the Addition to *Lambert*) eſtabliſhes, That if a Man be found ſlain, he ſhould be taken to be a Frenchman if it was not proved that he was an Englſhman, and the Country was bound to enquire whether the perſon ſlain was an Englſh-man or a French-man. Theſe Inquiſtions were taken before the Coroner, and returned to the Juſtices in *Eyre*, and if the Jury found him an Englſhman, then the Country was to be diſcharged, which Law was called *Engliſhire*, and the Juſtices in *Eyre* were alſo bound to enquire thereof, until the Statute of 14 E. 3. which, as it is mentioned in *Stamford*, was aboliſhed.

P. C. 18 a.

Hereby a miſtake upon the Statute of *Marlebridge* is rectified, which is *cap. 26. Murdrum de cætero non adjudicetur coram Juſticiariis, ubi per infortunium tantummodo adjudicatum eſt, ſed locum habeat Murdrum de interfeſtis per Feloniam tantum, & non aliter.* This was not made upon a Suppoſition that he that killed the Perſon ſlain by Miſfortune ſhould be hanged, but only to explain, or rather to take off the Rigor of the Conqueror's Law, that the Country ſhould not be compelled to find out

2 Inſt. part 1.
148.

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the Manslayer; or if he were found out, he should not undergo the Penalty of that Law. For as the Law stood, or was interpreted before that Statute, if a Man was found to be slain, it was always intended.

1. That he was a *Frenchman*. 2. That he was killed by an *Englishman*. 3. That killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tried by Fire and Water, though he killed him by Misfortune; which was extended beyond Reason and Justice in favour of the *Normans*: but if an *Englishman* was killed by Misfortune, he that killed him was not in danger of Death, because it was not Felony. For, saith *Brañon* (who wrote the latter-end of *H. 3.*) *fo. 136.*

He that killed a Man by Misfortune was to be discharged. [123] 5. If the Malefactor was not taken, then the Country was to be amerced. But by the Statute of *Marlebridge*, if it was known that the Person slain was a *Frenchman*, and was killed by Misfortune, then the Country should not be amerced if the Manslayer was not taken, or if he were taken, he should not be put to his Ordeal Trial. This seems to be the true meaning of that Statute.

But, *secondly*, it will appear to a Demonstration, that before that Statute, he that killed an *Englishman per infortunium* was never in danger of Death; for this Statute of *Marlebridge* was made 52 *H. 3.* The Statute of *Magna Charta* was consummate 9 *H. 3.* and that directs, that every one imprisoned for the Death of a Man, and not thereof indicted, might of Right pursue the *Writ de Odio & Atia*; and if it was found that the Person imprisoned killed him *se defendendo*, or *per infortunium*, and not *per feloniam*, then he was to be bailed. Which shews that he was not in danger of Death; for if he had, he would not have

1 Hawk. 88.

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have been let to bail, 2 *Inst. part* 1. 42. *Coke* 9. 56. *Les Poulters Case, Register* 133. b. *Vide the Writ de ponendo in Ballium.*

Hereby I have given a true Account of the Sense of the Word Murder, that it was when (first in the Time of *Canutus*) a *Dane* and since (in *William* the Conqueror) when a *Frenchman* was killed; for as it was then supposed in the Time of *Canutus*, the *Englishmen* hated the *Danes* upon the Account of their Nation that had subdued them, and would upon all Occasions seek their Destruction, as they did of a considerable Number of them in the Time of *Ethelred*, the *Saxon* King, that preceded *Canutus* next save one; so the Conqueror had the same Reason to suspect the Safety of his Normans.

[124] Afterwards, as appears by the Confessor's Laws, *Lamb.* 141.¹ the secret or insidious killing of any other as well as a Foreigner was declared to be Murder. *Brañton* 120, 134, 135. Murder is thus defined, *Est occulta hominum extraneorum & notorum occiso manu hominum nequiter perpetrata*. With which agrees the other old Books of *Britton* and *Fleta*: Only in Case of a Foreigner it was penal to the Country; not of a Native.

Next, it may be necessary to shew what was to be understood by *Homicide* or *Manslaughter*. *Brañton* 120, 121. mentions the worst Part of It, which is a voluntary *Homicide*, defined in this Manner: *Si quis ex certa scientia & in assultu præmeditato, ira, vel odio, vel causa lucri, nequiter & in feloniam, ac contra Pacem Domini Regis aliquem interfecerit*: If one knowingly, and by a premeditated Assault, by Anger or Hatred, or for Lucre-sake, should kill another, this was accounted *Manslaughter*; if it be done *clanculo*, saith *Brañton*, it is *Murder*: That was all the

¹ In some editions 237.

the Difference there was between the one and the other.

It appears, that since that of *Bracton* the Notion of *Murder* is much altered, and comprehends all *Homicides*, whether privately or publicly committed, if done by *Malice prepensed*. With this agrees *Stam. Pl. Cor.* 18. b. *At this day* (saith he) *a Man may define Murder in another Manner than it is defined by Bracton, Britton and Fleta: If any one of Malice prepensed doth kill another, be he Englishman or Fereigner, if secretly or publicly, that is Murder. This was the Definition long before the making of the Statutes of 4 & 23 H. 8. and the other Statutes that took away Clergy.* To define *Murder*, there must be *malitia præcogitata*, as also *murdravit*: So that if an Indictment be that the Party *murdravit*: and not *ex malitia præcogitata*, it is but *Manſlaughter*. *Yel.* 204. 2 *Cro.* 283. 1 *Bul.* 141. *Bradly and Banks.* So if it be *ex malitia præcogitata*, omitting *murdravit*, it is but *Manſlaughter*. *Dyer* 261. *Pl.* 26, 304. *Pl.* 56. *Vide Stat.* 10 E. 3. *Stat.* 1. cap. 2. The Parliament complained that Murderers, &c. were encouraged to offend, because Pardons of *Manſlaughters* were granted ſo eaſily; the Act therefore prohibits the granting thereof. 13 R. 2. *ſtat.* 2 cap. 1. recites the ſame Miſchief and great Damage by Treasons, Murders, &c. because Pardons have been eaſily granted: Therefore the Act doth provide, *That if a Charter for the Death of a Man be alledged before any Juſtice, in which Charter is not ſpecified that he of whoſe Death any ſuch is arraigned was murdered or ſlain by Await, Affault or Malice prepensed, it ſhall be enquired whether he was murdered or ſlain by Affault, Await, or Malice prepensed; and if it be ſo found the Charter of Pardon ſhall be diſallowed.* This is a plain Description

Description of Murder, as it was taken to be according to the Common Understanding of Men.

Ever since the killing of a Man by Assault of Malice prepenſed hath been allowed to be Murder, and to comprehend the other two Inſtances. But because that Way of killing by Poiſon did not come under the ancient Definition of *Bracton*, &c. which is ſaid to be *manu hominum perpetrata*, or of this Statute of 13 R. 2. Therefore by the Statute of 1 E. 6. cap. 12. It was enacted, That wilful poiſoning of any Perſon ſhould be accounted wilful Murder of Malice prepenſed. Foſt. 68.

One Thing more is fit to be obſerved, That in all Indictments for Murder a Man is not charged poſitively, that he did Murder the Perſon ſlain, but that he *ex malitia præcogitata, in ipſum inſultum facit, ac cum quodam gladio*, he gave him a Wound whereof he died: *Et ſic ex Malitia præcogitata ipſum Murderavit*, ſo the Murder is charged upon him by way of Conclusion, and as a Conſequence from the antecedent Matter that is poſitively alledged. To come cloſe to a State of the preſent Queſtion, It doth appear that *Mawgridge* threw the Bottle at Mr. *Cope* without any Provocation given to him; for the Difference was between him and the Woman that was there in Company, and his Behaviour was ſo rude and diſtaſteful as did induce Captain *Cope* to deſire him to leave the Room, where he was only a Gueſt to him, and there by his Permiſſion, this *Cope* might reaſonably do, which could be no Cauſe to provoke *Mawgridge* to make the leaſt Aſſault upon him; therefore I ſhall maintain theſe three poſitions.

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1. That in this Caſe there is expreſs Malice by the Nature and Manner of *Mawgridge's* throwing the Bottle, and drawing his Sword immediately thereupon.

2. That Mr. *Cope's* throwing a Bottle at *Mawgridge*,

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gridge, whereby he was hit and hurt before he gave Mr. *Cope* the mortal Wound, cannot make any Alteration in the Offence by reducing it to be of so low a Degree as Manslaughter.

3. I shall consider what is such a Provocation as will make the Act of killing to be but Manslaughter only.

FoR. 256, 257.

1. Here is express Malice, that appears by the Nature of the Action. Some have been led into mistake by not well considering what the Passion of Malice is; they have construed it to be a Rancour of Mind lodged in the Person killing, for some considerable Time before the commission of the Fact, which is a mistake arising from the not well distinguishing between Hatred and Malice. Envy, Hatred, and Malice, are three distinct Passions of the Mind.

1. Envy properly is a repining or being grieved at the Happiness and Prosperity of another, *Invidus alterius rebus macrescit opimis*.

2dly, Hatred, which is *odium*, is as *Tully* saith, *Ira inveterata*, a Rancour fixed and settled in the Mind of one towards another, which admits of several Degrees. It may arrive to so high a Degree, and may carry a Man so far as to wish the Hurt of him, [127] though not to perpetrate it himself.

3dly, Malice is a Design formed of doing mischief to another; *cum quis data opera male agit*, he that Designs and useth the Means to do ill is Malicious, 2 *Inst.* 42. *Odium* signifies Hatred, *Atia* Malice, because it is Eager, Sharp and Cruel. He that doth a cruel Act voluntarily, doth it of Malice prepensed, 3 *Inst.* 62. By the Statute of 5 *Hen.* 4. cap. 5. If any one out of Malice prepensed, shall cut out the Tongue or put out the Eyes of another, he shall incur the Pain of Felony. If one doth such a Mischief on a sudden, that is Malice prepensed; for saith my Lord

Lord Coke, *If it be voluntarily, the Law will imply Malice.* Therefore when a Man shall without any Provocation stab another with a Dagger, or knock out his Brains with a Bottle, this is exprefs Malice, for he designedly and purpofely did him the Mifchief. This is fuch an Aft that is malicious in the Nature of the Aft itfelf, if found by a Jury, though it be fudden, and the Words *ex malitia præcogitata* are not in the Verdict, 3 Cro. Car. 131. *Halloway's* Cafe, who was *Woodward* of *Austerly Park*: A Boy came there to cut Wood, whom by chance he efpying, and the Boy being upon a Tree, he immediately calls to him to defcend, which the Boy obeying, *Halloway* tied him to an Horfes Tail with a Cord that the Boy had, then gave him two Blows, the Horfe run away and brake the Boy's Shoulder whereof he died. This was ruled to be Murder by all the Juftices and Barons, except Juftice *Hutton*, who only doubted thereof; and that was a ftronger Cafe than this, for there was fome kind of Provocation in the Boy, who was ftealing the Wood in the Park, of which *Halloway* had the Care; and it cannot be reasonably thought that he designed more than the Chaf tifement of the Boy, and the Horfe running away in that Manner was a furprife to *Halloway*; yet in regard the Boy did not refift him, his tying him to the Horfes Tail was an Aft of Cruelty, the Event whereof proving fo fatal, it was adjudged to be Malice prepenfed, though of a fudden, and in the heat of Paffion. This Cafe is reported in *Jones* 198. *Pal.* 545. And there held, that the Court could determine it to be Malice prepenfed upon the fpecial Matter found, *Crompton* 23. Two playing at Tables fall out in their Game, one upon a fudden kills the other with a Dagger: This was held to be Murder by *Bromley*

W. Jones 198.
1 *Hawk.* 99.
1 *H. P. C.* 454.
Palmer, 545.

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at

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at *Chester Affizes*, 27 *Eliz.* So in this Case, if the Bottle had killed Mr. *Cope* before he had returned the Bottle upon *Mawgridge*, that would have been Murder without all manner of Doubt.

1 Hawk. 82, 83.
1 Hale 479.

Foff. 278.

1 Hawk. 484.
Sect. 23.

1 Hawk. 87.
Foff. 273.

Foff. 274, 5.

In the second Place, I come now to consider whether Mr. *Cope's* returning a Bottle upon *Mawgridge* before he gave him the mortal Wound with the Sword, shall have any manner of Influence upon the Case; I hold not. First, because *Mawgridge* by his throwing the Bottle hath manifested a malicious Design. Secondly, his Sword was drawn immediately to supply the Mischief which the Bottle might fall short of. Thirdly, the throwing the Bottle by Captain *Cope* was justifiable and Lawful; and though he had wounded *Mawgridge*, he might have justified it in an Action of Assault and Battery, and therefore cannot be any Provocation to *Mawgridge* to stab him with his Sword. That the throwing the Bottle is a Demonstration of Malice is not to be controverted; for if upon that violent Act he had killed Mr. *Cope* it had been Murder. Now it hath been held, that if *A.* of his Malice premeditated assaults *B.* to kill him, and *B.* draws his Sword and attacks *A.* and pursues him; then *A.* for his own safety gives back, and retreats to a Wall; *B.* still pursuing him with his drawn Sword, *A.* in his defence kills *B.* This is Murder in *A.* For *A.* having Malice against *B.* and in pursuance thereof endeavouring to kill him is answerable for all the consequences, of which he was the original Cause. It is not reasonable for any Man that is dangerously assaulted, and when he perceives his Life in danger from his Adversary, but to have Liberty for the security of his own Life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath Malice against another

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is

is not fit to be trusted with a dangerous Weapon in his Hand, *Dalton*¹ 292. *Hale*² 42. And so resolved by all the Judges, 18 *Car.* 2. when they met at *Serjeants-Inn* in Preparation for my Lord *Morley's* Trial, *Dalton*³ 272. If *A.* of Malice prepenfed, discharge a Pistol at *B.* and then runs away, *B.* pursues him, and *A.* turns back, and in his own Defence kills *B.* it is Murder. This I hold to be good Law; for *A.* had a malicious Intent against *B.* and his retreat after he had discharged his Pistol at *B.* was not because he repented, but for his own safety.

¹ Hawk. 96.
Ante, 85.

In a Jet Duel, there are mutual passes made between the Combatants, yet if there be original Malice between the Parties, it is not the Interchange of Blows will make an Alteration, or be any Mitigation of the Offence of killing. Therefore I hold, if *Mawgridge* had thrown the Bottle at Mr. *Cope*, and Mr. *Cope* had returned another upon him and hit him, and thereupon *Mawgridge* had drawn his Sword and killed Mr. *Cope*, it would have been Murder. Some will say, that there is a difference between the Cases, for that the Assault by the Pistol, and the fighting a Duel was express Malice, but this is only Malice implied. Surely there is no difference, for Malice implied is prepenfed, as much as if there had been a proof of Malice, or Hatred for some considerable Time before the Act; for the Stroke given, or an attempt made by Malice implied, is as dangerous as a Stroke given upon Malice expressed, therefore may be as lawfully resisted. This very point was also considered by the 12 Judges at *Serjeants-Inn*, and by them resolved to be Murder upon the occasion of my Lord

¹ Hawk. 97.

¹ In some editions pages 339 or 314.

² Sum.

³ In some editions 302 or 328.

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Ante, 85.

Lord *Morley's Case*. When a Man attacks another with a dangerous Weapon without any Provocation; that is exprefs Malice from the Nature of the A&, which is cruel. The definition of Malice implied is where it is not exprefs in the Nature of the A&; as [130] where a Man kills an Officer that had Authority to arrest his Person: The Person who kills him in defence of himself from the Arrest is guilty of Murder, because the Malice is implied, for properly and naturally it was not Malice, for his Design was only to defend himself from the Arrest.

Hawk. 96, 97,
98.

3. I come now to the third Matter propofed, which is to confider what is in Law fuch a Provocation to a Man to commit an A& of Violence upon another, whereby he fhall deprive him of his Life, fo as to extenuate the Fa&, and make it to be a Manflaughter only. Firft, *Negatively* what is not. Secondly, *Pofitively* what is. Firft, No Words of Reproach or Infamy, are fufficient to provoke another to fuch a degree of Anger as to ftrike, or affault the provoking Party with a Sword, or to throw a Bottle at him, or ftrike him with any other Weapon that may kill him; but if the Perfon provoking be thereby killed, it is Murder.

In the Affembly of the Judges, 18 *Car.* 2. this was a Point pofitively refolved.¹

Therefore I am of Opinion, that if two are in Company together, and one fhall give the other contumelious Language (as fuppose *A.* and *B.*) *A.* that was fo provoked, draws his Sword and makes a pafs at *B.* *B.* (then having no Weapon drawn) but miffes him. Thereupon *B.* draws his Sword and paffes at *A.* And there being an interchange of paffes between

¹ Lord Morley's Case, ante, 53.

tween them, *A.* kills *B.* I hold this to be Murder in *A.* for *A.*'s pass at *B.* was malicious, and what *B.* afterwards did was lawful. But if *A.* who had been so provoked draws his Sword, and then before he passes, *B.*'s Sword is drawn; or *A.* bids him draw, and *B.* thereupon drawing, there happen to be mutual passes: if *A.* kills *B.* this will be but Manslaughter, because it was sudden; and *A.*'s Design was not so absolutely to destroy *B.* but to combat with him, whereby he run the hazard of his own Life at the same Time. But if Time was appointed to fight (suppose the next Day) and accordingly they do fight; it is Murder in him that kills the other. But if they go into the Field immediately and fight, then but Manslaughter. Suppose upon provoking Language given by *B.* to *A.* *A.* gives *B.* a box on the Ear, or a little blow with a Stick, which happens to be so unlucky that it kills *B.* who might have some Impostume in his Head, or other Ailment which proves the Cause of *B.*'s Death, this blow though not justifiable by Law, but is a wrong, yet it may be but Manslaughter, because it doth not appear that he designed such a Mischief.

Foß. 295.
1 Hawk. 96,
98.

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1 Hawk 99.
Foß. 291.

2. Secondly, As no Words are a Provocation, so no affronting Gestures are sufficient, though never so reproachful; which Point was adjudged, *Cro. Eliz.* 779. *Watts and Brains*, in an Appeal of Murder.

1 Hawk. 98.
1 H. P. C. 454,
6.
Noy. 171. S.C.

There having been a Quarrel between *A.* and *B.* and *B.* was hurt in the Fray; and about two Days after, *B.* came and made a wry Mouth at *A.* who thereupon struck him upon the Calf of the Leg, of which he instantly died. It was Murder in *A.* For the affronting him in that Manner was not any Provocation to *A.* to use that Violence to *B.*

1 Hawk. 97, 98

There hath been another Case which I fear hath been

1 Hawk. 90.

2 Lev. Part 3.
255.
Skinner, 668.
1 Hale 469.

been the occasion of some Mistake in the decision of Questions of this Kind, *Jones* 432. *D. Williams' Case*, he being a *Welsh-man*, upon *St. David's Day* having a Leek in his Hat, a certain Person pointed to a *Fack of Lent* that hung up hard-by, and said to him look upon your Countryman ; at which *D. Williams* was much enraged, and took a Hammer that lay upon a Stall hard-by, and flung at him, which missed him, but hit another and killed him : He was indicted upon the Statute of stabbing. Resolved, he was not within that Statute, but guilty of Manslaughter at Common [132] Law. I concur with that Judgment, that it is not within the Statute of stabbing, for it is not such a Weapon, or Act that is within that Statute, neither could he be found guilty of Murder, but only of Manslaughter, for the Indictment was for no more. But if the Indictment had been for Murder, I do think that the *Welsh-man* ought to have been convicted thereof, for the Provocation did not amount to that degree, as to excite him designedly to destroy the Person that gave it him.

Foss. 261.

3. Thirdly, If one Man be trespassing upon another, breaking his Hedges or the like, and the Owner, or his Servant, shall upon sight thereof take up an Hedge-stake, and knock him on the Head ; that will be Murder, because it was a violent Act, beyond the proportion of the Provocation, which is sufficiently justified by *Halloway's Case*, who did not seem to intend so much the Destruction of the young Man that stole the Wood, as that he should endeavour to break his Skull or knock out his Brains, yet using that violent and dangerous Action of tying him to the Horse-tail, rendered him guilty of Murder.

If a Man shall see another stealing his Wood, he cannot justify beating him, unless it be to hinder him from

from stealing any more, (that is) that notwithstanding he be forbid to take any he doth proceed to take more, and will not part with that which he had taken. But if he desists, and the Owner Woodward pursues him to beat him so as to kill him. It is Murder.

If a Man goes violently to take another Man's Goods, he may beat him off to rescue his Goods, 9 E. 4. 281. b. 19 Hen. 6. 31. But if a Man hath done a Trespass and is not continuing in it; and he that hath received the Injury shall thereupon beat him to a degree of killing. It is Murder; for it is apparent Malice; for in that Case he ought not to strike him, but is a Trespasser for so doing.

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4. Fourthly, If a Parent or a Master be provoked to a degree of Passion by some Miscalriage of the Child or Servant, and the Parent or Master shall proceed to correct the Child or Servant with a moderate Weapon, and shall by chance give him an unlucky stroke, so as to kill him; that is but a Misadventure. But if the Parent or Master shall use an improper Instrument in the Correction; then if he kills the Child or the Servant, it is Murder: And so was it resolved by all the Judges of the *King's Bench*, with the Concurrence of the Lord Chief Justice *Bridgeman*, in a special Verdict in one *Grey's Case* found at the *Old Baily* 10 Oct. 18 Car. 2. and removed into this Court. *Grey* being a *Smith*, *B.* was his Servant; he commanded *B.* his Servant to mend certain Stamps belonging to his Trade; afterwards he and his Servant being at Work at the Anvil, *Grey* asked his Servant whether he had mended the Stamps, as he had directed him. But *B.* the Servant having neglected his Duty acknowledged it to his Master, upon which the Master was angry, and told

1 Hawk. 85.

Grey's Case,
Vide ante.
99.
and references
there.
Fost. 262.
1 H. P. C.
474.

told him if he would not serve him, he should serve at *Bridewel*; to which the Servant replied, that he had as good serve in *Bridewel* as serve the said *Grey*; whereupon the said *Grey* took the Iron Bar upon which he and his Servant were working, and struck his Servant with it upon the Skull, and thereby brake his Skull, of which the Servant died. This was held to be Murder; yet here was a Provocation on a sudden, as sudden a resentment, and as speedy putting it in Execution; for though he might correct his Servant both for his neglect and unmannerliness, yet exceeding measure therein, it is malicious. Every one must perceive that this last is a much stronger Case than this at Bar.

1. First, *Grey* was working honestly and fairly at his Trade, and justly calling to his Servant for an account of his Business; this Miscreant was in the actual violation of all the Rules of Hospitality. [134]

2. Secondly, *Grey's* Action was right, as to the striking his Servant by way of Correction; but the Error was in the Degree, being too violent, and with an improper Weapon. This of *Mawgridge* was with a Resolution to do Mischief.

3. Thirdly, he had not the least Provocation from Mr. *Cope*, until after he had made the first and dangerous Assault, and then pursued it with the drawing his Sword to second it, before Mr. *Cope* returned the other Bottle. But *Grey* had a Provocation by the disappointment his Servant gave him in neglecting his Business, and returning a saucy Answer.

The like in obstinate and perverse Children, they are a great grief to Parents, and when found in ill Actions, are a great Provocation. But if upon such Provocation the Parent shall exceed the degree of Moderation, and thereby in chastising kill the Child,
it

it will be Murder. As if a Cudgel in the Correction that is used be of a large size, or if a Child be thrown down and stamped upon. So said the Lord *Bridge-man* and Justice *Twisden*, and that they ruled it so in their several Circuits.

5. If a Man upon a sudden Disappointment by another shall resort violently to that other Man's House to expostulate with him, and with his Sword shall endeavour to force his Entrance, to compel that other to perform his Promise, or otherwise to comply with his desire; and the Owner shall set himself in opposition to him, and he shall pass at him, and kill the Owner of the House, it is Murder, 2 *Roll. Rep.* 460. *Clement* against *Sir Charles Blunt*, in an Appeal of Murder. [135] The Case was, that *Clement* had promised a Dog to *Sir Charles Blunt*; and being requested accordingly to deliver him, refused, and beat the Dog home to his House: At which *Sir Charles Blunt* fetched his Sword, and came to *Clement's* House for the Dog. *Clement* stood at the Door, and refused his Entry. *Blunt* thereupon kills *Clement*. The Jury were merciful, and found this Fact in *Sir Charles Blunt*, to be but Manslaughter. *Dodderidge* was clearly of Opinion it was Murder. But the Lord Chief Justice was a little tender in his direction to the Jury. But *Rolls* makes this remark, that it was not insisted upon by the Appellant's Council, that *Clement* was in the defence of his House, and that *Blunt* attacked *Clement* to force in: It was without all question Murder, though of a sudden heat, for there was no Assault made by *Clement* upon him, nor on any of his Friends, but all the violence and force was on *Sir Charles Blunt's* side. 1 Hawk. 98. 2 Roll. 460.

Having in these particulars shewn what is not a provocation sufficient to alleviate the act of Killing,
jo

so as to reduce it to be but a bare *homicide*, I will now, secondly, give some particular Rules, such as are supported by Authority and general consent, and shew what are always allowed to be sufficient provocations.

1 Hawk. 98.

1. First, If one Man upon angry words shall make an Assault upon another, either by pulling him by the Nose, or filliping upon the Forehead, and he that is so assaulted shall draw his Sword, and immediately run the other through, that is but Manslaughter; for the Peace is broken by the Person killed, and with an indignity to him that received the Assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him.

1 Hawk. 90
in Notes.
1 Hale 470.
Stiles 467.
Quære if the
Case be not also
reported
with some
slight differ-
ence by Hale
in 1 H. P. C.
470.

There is a Case in *Stiles* 467. *Buckner's Case*. [136]
Buckner was indebted, and *B.* and *C.* came to his Chamber upon the account of his Creditor to demand the Money. *B.* took a Sword that hung up, and was in the Scabbard, and stood at the Door with it in his Hand undrawn, to keep the Debtor in until they could send for a Bailiff to Arrest him; thereupon the Debtor took out a Dagger which he had in his Pocket and stabbed *B.* This was a Special Verdict and adjudged only Manslaughter, for the Debtor was insulted, and imprisoned injuriously without any Process of Law, and though within the words of the Statute of Stabbing, yet not within the reason of it.

2. Secondly, If a Man's Friend be assaulted by another, or engaged in a Quarrel that comes to Blows, and he in the vindication of his Friend, shall on a sudden take up a mischievous Instrument and kill his Friend's Adversary, that is but Manslaughter; so was the Case, 12 *Rep.* 87.¹ If two be fighting together,

¹ Manslaughter.

together, and a Friend of the one takes up a Bowl on a sudden, and with it break the Skull of his Friend's Adversary, of which he died, that is no more than Manslaughter. So it is, if two be fighting a Duel, though upon Malice prepensed; and one comes and takes part with him, that he thinks may have the disadvantage in the Combat, or it may be that he is most affected to, not knowing of the Malice, that is but Manslaughter, *Pl. Com.* 101. *John Vaughan and Salisbury.*

[137] 3. Thirdly, If a Man perceives another by force to be injuriously treated, pressed, and restrained of his Liberty, though the Person abused doth not complain, or call for Aid or Assistance; and others out of Compassion shall come to his Rescue, and kill any of those that shall so restrain him, that is Manslaughter, 18 *Car.* 2. adjudged in this Court upon a Special Verdict found at the *Old Bailey*, in the Case of one *Huggett*, 18 *Car.* 2. *A.* and others in the time of the *Dutch War* without any Warrant impressed *B.* to serve the King at Sea. *B.* quietly submitted and went off with the Press-Masters: *Huggett* and the others pursued them and required a sight of their Warrant; but they shewed a piece of Paper, that was not a sufficient warrant: Thereupon *Huggett* with the others drew their Swords, and the Press-Masters theirs, and so there was a Combat, and those who endeavoured to Rescue the pressed Man killed one of the pretended Press-Masters. This was but Manslaughter, for when the Liberty of one Subject is invaded, it affects all the rest: It is a provocation to all People, as being of ill example and pernicious Consequence. All the judges of the King's Bench, viz. *Kelyng*, *Twissden*, *Wyndham* and *Morton* were of opinion, that it was Murder, because he meddled

Fost. 154.

Vide ante 93.
1 Hawk. 103.
1 H. P. C. 465
—*Fost.* 154.
314

This Opinion
is contended
against by
Foster 315 to

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318, who concurs with Kelyng and the three other Judges.

1 Hawk. 98.

2 Keb. 829.

2 Brown. 151.

in matter in which he was not concerned : But the other eight Judges of the other Courts conceived it only Manslaughter, to which the Judges of the King's Bench did conform, and gave judgment accordingly.

4. Fourthly, When a Man is taken in Adultery¹ with another Man's Wife, if the Husband shall stab the Adulterer, or knock out his Brains, This is bare Manslaughter : for Jealousy is the Rage of a Man, and Adultery is the highest Invasion of property, 1 Vent. 158. *Raymond* 213. *Manning's Case*.²

If a Thief comes to Rob another, it is lawful to Kill him. And if a Man comes to Rob a Man's Posterity and his Family, yet to Kill him is Manslaughter. So is the law though it may seem hard, that the killing in the one Case should not be as justifiable as the other. 20 *Leviticus*, 10 *Ver.* *If one committeth Adultery with his Neighbour's Wife, even he the Adulterer and the Adulteress shall be put to death.* [138] So that a Man cannot receive a higher Provocation. But this Case bears no proportion with those Cases that have been adjudged to be only Manslaughter, and therefore the Court being so advised doth determine that *Mawgridge* is Guilty of Murder. More might be said upon this occasion ; yet this may at present suffice to set the Matter now in question in its

¹ Although this is the highest possible invasion of Property, a Man is not justifiable in killing another, whom he taketh in Adultery with his Wife ; for it favours more of sudden Revenge, than of Self-preservation ; but this Law hath been executed with great Benignity. 1 Hawk. in *Notes* to p. 90. If the Husband, however, detect the Ravisher in the Attempt, the Wife calling for Assistance, it is excusable, *se defendendo*. 1 Hale. 486. 4 Black. Com. 181.

² In some books called Maddag's Case [in others Maddy's].

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its true Light, to shew how necessary it is to apply the Law to exterminate such noxious Creatures. Upon this Conviction the Court did direct that Process should be issued against *Mawgridge*, and so to proceed to Outlawry if he cannot be retaken in the mean time.

¹ Hale 305 it is said contrary to this determination, and those of Mackally, 9 Co. Rep. 70. and Queby's Case 9 St. T. 14. ² Stra. 766. ³ L. Raym. 1485. ⁴ Barnard, 17—that he had rarely known any special verdict where the Question was Murder or Manlaughter, Judgment to be given for Murder, but commonly for Manlaughter, *se defendendo*.


FINIS.



A
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Wives.

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A TREATISE UPON THE LAW AND
PROCEEDINGS IN CASES OF
HIGH TREASON, &c.



A
T R E A T I S E
UPON THE
LAW AND PROCEEDINGS
IN CASES OF
HIGH TREASON, &c.

BY A BARRISTER AT LAW.

LONDON:
PRINTED FOR THE AUTHOR,
BY A. STRAHAN AND W. WOODFALL,
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IN FLEET STREET.

1793.

E E



P R E F A C E.

THIS cursory treatise upon the law of High Treason is presented to publick perusal, not with the pride of confidence, but with the humility of diffidence ; the days of insinuating prefaces are no more ; fiction cannot borrow the charms of truth, nor ignorance erect the standard of science. The popular mind, from the gradual diffusion of knowledge, and repeated acts of observation, has acquired the habit of judging for itself ; and however circumstances may delay the fall, every work must ultimately stand upon the broad or narrow basis of merit.

Since therefore criticism is no longer reposed in the hands of dulness, nor merit at the mercy of caprice, the Author soothes not the brow of censure by flattery, nor deprecates his sentence by subterfuge ; but wishes to atone for the many errors of his work by an early and ingenuous confession. And if the Publick regards with the fondness of a parent, even this mutilated offspring of the brain, such fostering effects cannot fail to brighten his prospects, and excite the liveliest sentiments of gratitude.

But, however despicable the execution may appear, the importance and utility of the subject may perhaps

haps command attention ; these laws are not made to strengthen the bloody hands of tyrants, or guard the pavilions of lust ; but for the preservation of one, who from the earliest dawn of his reign has watched over and protected the dearest interests of the country, and who sits not on high, surrounded by the might and terror of Kings, but is enthroned in the hearts of his People.

Since therefore the King, by his virtues and prerogatives, protects the Constitution ; the Constitution, in return, protects him by its laws.

Sceptered happiness is not enviable. The prince that embraces the nation as a family, has engagements that never cease, and cares that never end. Every joy gladdens his heart, and every cry pierces his soul. The brightest jewel in the royal diadem is justice, and the fairest flower is mercy. The noblest attribute of the scepter is prerogative, which is not, nor cannot be, invested in the crown, for purposes of oppression, but is continually exerted for the good of the Community.

This is the most awful period that can engage the attention of man ; witness the solemn scenes that are acting upon the theatre of a neighbouring kingdom. In those polluted spots, where holy altars blazed, clouds of carnage ascend the skies ; despair and dismay are the consequences of that fatal catastrophe which annihilated the political existence of France, and eclipsed, in a moment, the gaiety of nations. But, enough. The breath of tradition and the annals of history will transmit the execrable deed, to the indignation of distant ages. The exiled clergy of France have experienced the wonted generosity of the English nation. Their ill-fated destiny and the mis-guided counsels that occasioned it,

it, fat heavy on the soul of their dying patron ; it is our duty, therefore, to continue the sweets of charity, towards objects, whose only crimes are fidelity to their God, loyalty and attachment to their king, and love for their country.

These laws of Treason breathe a spirit of mildness and indulgence to the subject. The learned bishop Burnet observes, that their promulgation seems adapted to give encouragement and security to traitors. Certainly, the requisition of two witnesses to an overt act, is an advantage that must always support the cause of innocence. Since our criminal code has advanced towards perfection, no long and black catalogue of traitors stares us in the face. No star that shines in the political hemisphere, will ever again fall a sacrifice to fictitious treason. Our nobles will not be cut off in the pride of honour and flower of youth, nor our statesmen breathe their last for serving their country with zeal. No Sidney will stain the page of history—No Russell will drop innocent blood on the scaffold.

One word of the press. The liberty of the press is the *palladium* of the constitution, but its licentiousness is *Pandora's* box, the source of every evil. Factious leaders have in all ages called themselves the People ; they point out to the multitude by virtue of this assumed authority, grievances that exist only in imagination, and promise those scenes of happiness which can never be the lot of the many. But these men know full well the remedies they administer ; they prescribe a soothing cordial, which produces the agonizing convulsions of poison. These men give the tone to the multitude, and the cry that their High Mightinesses have echoed for the present day, is the *liberty of the press*. But let the votaries of the press

press remember, that no government, ancient or modern, ever yet enjoyed half such an unbounded freedom of publick discussion as our own, and that unless the press is restrained and new-modelled, this censorial power, as it is called, will soon become the legislative. In the *Athenian* government, the court of *Areopagus* punished wits and libellers with death. In the *Roman* common-wealth the liberty of writing was curbed by the severest laws. In modern days, the *Spanish* inquisition is not yet forgot. *Venice* watches her press with such jealousy and vigilance, that the fundamental maxim of the state is, silence in publick affairs ; and in bleeding *France* the people are deprived of expressing even their thoughts. In our own government as a grateful return for as much unlimited enquiry into political measures as is consistent with the welfare of the state, the enemies of our country would fain persuade us, that the liberty of the press is in danger of annihilation, and to be again subject to the restrictive power of a licenser, and learning engrossed as the staple commodity of the kingdom. The words of their adored Milton apply to themselves.

“ They baul for *freedom* in their senseless moods,
 “ And still revolt, when truth would set them free ;
 “ *Licence* they mean, when they cry *Liberty*.”

All Europe is in arms, and the happiness of millions depends on the event. This is not a war of conquest, ambition, or aggrandizement ; not a war of commerce, or for territorial acquisition. But it is singularly conspicuous for implicating the question, whether the elements of civil society are to be disorganized, and reduced to a chaos. It is a war undertaken, because the balance of the world trembles on it's beam. Under these circumstances, the
 British

British nation awakes at the early call of danger ; while visions of immortal glory, and dreams of victorious rapture swim before the warrior's eyes. Like an eagle she mews her mighty young, and soaring aloft, kindles her undazzled eyes, at the full mid-day beam. Whilst the inferior birds of prey, glutted with rapine, and foul with blood, are scared at the sight, and by discordant and dreadful notes prognosticate their future fall.

Amid this ardor of loyalty, and vigour of preparation, it is the duty of every citizen to associate with good men, for the preservation of domestic peace, and for those concerns which are nearest and dearest our hearts, liberty and life. A late attempt to overturn the constitution has been prevented by a manly and unbiassed appeal to the sentiments of the nation. For this signal favor, and for the success of our arms and internal tranquillity, let us not forget to assail the willing ears of that omnipotent protector, who was the object of *Wolsey's* pathetic lamentations in the last moments of expiring grandeur. From the experience of the past, we may hope with confidence, that the storms of faction will never shiver those beauteous laurels of liberty, which have so effectually withstood the decays of time, and the ravages of prerogative ; and that no malignant cloud will force the untimely setting of that genial sun, which shines with a mighty lustre, in the eyes of all the world.

London, March 4, 1793.



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CHAPTER



CHAPTER I.

Of High Treason.

TREASON, generally speaking, is the breach of some particular duty, which the inferior is bound to pay to the superior. It is divided into High Treason and Petit Treason.

High Treason is a renunciation of that allegiance, either natural or local, which is due from every man, who lives under the King's protection. It is a crime levelled immediately at the person of the King, or the tranquillity of the kingdom ; and is called High [2] Treason on account of the majesty of the personage against whom it is committed.

Petit Treason, which is a breach of private duty, is the malicious killing of one, to whom obedience is due. As when a servant kills his master, a wife her husband, or an ecclesiastic his prelate.

There are three kinds of High Treason.

- I. High Treason by the common law.
- II. By the statute 25 of *Edward 3*.
- III. By subsequent statutes.

Before

Before we enter into a successive discussion of these, it will be proper to consider, what persons are capable of committing this crime.

Every subject of *Great Britain*, whether ecclesiastical or temporal, man or woman, if of the age of discretion, and of sane memory, may be guilty of high treason.¹ If a *married* woman commit high treason, in the company of her husband, or by his command, she is punishable as if *unmarried*; for in a crime of such magnitude, the presumption of coercion by the husband, is no excuse.² A soldier cannot justify, by the command of his superior officer, for as the command is traitorous, so is the obedience.³ Neither can a man justify by acting as counsel.⁴ Formerly, madmen were punished as traitors,⁵ but now they are not punishable, if the crime is committed, during a total deprivation of reason.⁶ [3]

If a man by personal force, and present fear of death, be compelled to join rebels or enemies, in acts of rebellion or hostility, it is held an excuse, but the party must shew, that it was an actual force, and that the traitors were left as soon as possible. These points were ruled in *Macgrowther's* case, in the rebellion of 1746.⁷ And those that supplied Sir *John Oldcastle*, [4]

¹ 1 Hawkins's Pleas of the Crown 8.

² Id. p. 4. 1 Hale's Pleas of the Crown 47.

³ Resolved by the judges, in the case of Axtell, a soldier, who commanded the guards, upon the trial and murder of Charles the First. Kelyng. 16. (3rd Ed.)

⁴ Cooke's case, who managed the charge against Charles the First. Kelyng. 28. (3rd Ed.)

⁵ 6 Bacon's Abr. 5th edit. 503; other editions 5 B. Abr. 109. 33 Hen. 8. c. 20.

⁶ 1 Hale 37. 4 Blac. Com. 24, 25. The case of Lieutenant Frith at the Old Bailey 1790.

⁷ Foxt. 13. 217. 9 Sta. Tri. 567, 568.

Oldcastle and his accomplices, then in rebellion, with provisions, were acquitted. Because it was found to be done, *pro timore mortis, et quod recesserunt quam citò potuerunt*.¹

- The husband of a Queen *regnant*, as was King *Philip*, may commit high treason. So may a Queen *consort*, against the King her husband. Such were the cases of Queen *Ann Boleyn* and *Catharine Howard*; ² for they are considered in the eye of the law, as distinct persons, for many purposes.³

- Aliens* may commit it; for as there is a local protection on the King's part, so there is a local allegiance on theirs.⁴ There is no distinction whether the alien's sovereign is in *amity* or *enmity* with the crown of *England*. If during his residence here, under the protection of the crown, he does that which would constitute treason in a *natural born* subject, he may be dealt with as a *traitor*.⁵ So also if he resides here, after a proclamation of war, between the two sovereigns; unless he openly removes himself, by passing to his own prince, or publicly renounces the king of *England's* protection, which is analogous to a *diffidatio*, or defiance; and then under such circumstances he is considered as an *enemy*.⁶ Thus the Marquis *De Guiscard*, a *French* papist, residing here during a war, under the protection of Queen *Anne*, was charged with holding a traitorous

¹ 1 Hale 50. 139. 141. But an apprehension, however well grounded, is no excuse. 1 Sta. Tri. 49. 4 Blac. Com. 30. 83. 8 Sta. Tri. 56 (by Howell).

² Principles of Penal Law 125.

³ 3 Coke's Inf. 8. 6 Bacon's Abr. 5th edit. 503; in other editions 5 B. Abr. 109.

⁴ 7 Coke's Reports 6. Calvin's Case.

⁵ 1 Hale 60.

⁶ 1 Hale 92.

traitorous correspondence with *France*. And two *Portuguese* were indicted and attainted of high treason, for joining in a conspiracy with Dr. *Lopez* to poison Queen *Elizabeth*.¹

If an *alien*, during a war with his native country, leaving his family and effects here, goes home, and adheres to the King's enemies, for the *purposes of hostility*, he is a traitor; for he was settled here, and his family and effects are still under the king's protection.² In declarations of war, it has been frequently usual to except, and take under the protection of the crown, such resident aliens, as demean themselves dutifully, and neither assist or correspond with the enemy. In that case they are upon the footing of aliens coming here by licence or safe conduct, and are considered as aliens *ami*.³ [7]

If an alien *enemy* invades the kingdom in a hostile manner, he cannot be *indicted* for treason, for he owes the King no allegiance, but may be proceeded against by *martial law*.⁴ If an alien is charged with a breach of his *natural* allegiance, he may give *alienage* in evidence, for he is charged with a breach of that species of allegiance which is not due from an alien.⁵

Alien merchants are protected by the statute staple,⁶
in

¹ 7 Coke's Rep. 6. Calvin's Case. Dyer's Rep. 144. Sherley's Case.

² 1 Salkeld 46. 1 Ld. Raymond 282. Foster's Crown Law 185, 186.

³ By all the judges, January 12, 1707. Foster 185.

⁴ 7 Coke's Rep. 6, 7. Perkin Warbeck's Case. 1 Hale 59. 100.

⁵ Cranburn's Case. 4 Sta. Tri. 699, 700.

⁶ 27 Ed. 3. Stat. 2. cap. 17. Magna Charta. ch. 30.
⁷ Infl. 58.

- [8] in case of a war, which provides, that they shall have convenient warning, by forty days proclamation, or eighty days in case of accident, to avoid the realm ; during which time they may be dealt with as traitors, for any treasonable act : if after that time they reside and trade here, as before, they may be either treated as alien *enemies*, by the law of nations, or as traitors, by the law of the land.¹

- It is a question, whether the general exemption of *embassadors* from the cognizance of the municipal tribunal, extends to treason ? On the one hand, there is a positive breach of local allegiance, on the other, an infringement of the privilege of personal inviolability, universally allowed by the law of nations.² Lord *Coke* maintains "that if an ambassador commits treason, he loses the privilege and dignity
[9] "of an ambassador, as unworthy of so high a place, "and may be punished *here*, as any other private "alien, and not remanded to his sovereign, but of "curtesy.³ Most writers agree that an ambassador "conspiring the death of the King, or raising a rebellion, may be punished with death. But it is "doubted, whether he is obnoxious to punishment "for bare conspiracies of this nature."⁴

The *Bishop of Ross*, ambassador from Mary Queen of Scots, to *Elizabeth*, was committed to the tower, as a confederate with the Duke of Norfolk, for corresponding with the Spanish ministry, to invade the kingdom ; he pleaded his privilege, and afterwards, having made a full confession, no criminal process was

¹ 1 Hale 93, 94.

² 2 Burlamaqui's Natural and Politic Law 367. 4 Inst.

³ Id. 153.

⁴ 1 Roll's Rep. 185. 1 Hale 96, 97, 99.

was commenced.¹ The Spanish ambassador for encouraging treason, and the French ambassador for [10] conspiring the same queen's death were only reprimanded. Doctor *Story* was condemned and executed, but he was an *Englishman* by birth, and therefore could never shake off his natural allegiance.²

From this view we may collect, that the *right* of proceeding against ambassadors for treason, in the ordinary course of justice, has been *waved* from motives of policy and prudence; and that they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody. As was done in the case of Count *Gyllenberg* the Swedish minister in George the Second's time.³

A *natural born* subject cannot abjure his allegiance, and transfer it to a foreign prince. Neither can any foreign prince, by naturalizing, or employing a subject of *Great Britain*, dissolve the bond of allegiance, [11] between that subject and the crown.⁴ This was determined, in the case of *Aneas Macdonald*, who was born in *Great Britain*, but educated from his early infancy in *France*; and being appointed commissary of the French troops intended for *Scotland*, was taken prisoner, tried, and found guilty of high treason.⁵

Treason by the
Common Law.

I. Treason by the common law was indefinite. General principles were laid down, to which every case

¹ 1 Hale 97. 1 Sta. Tri. 105. Cardinal Pole's person was held sacred, when Henry the Eighth demanded him of the Pope. 4 Inst. 153.

² Dyer 298, 300. 3 Sta. Tri. 775. Fost. 183. 1 Hawk. 9.

³ Foster 187. 1 Blac. Com. 254.

⁴ 1 Blac. Com. 369.

⁵ Foster 60, 184. 9 Sta. Tri. 585.

case was applicable, whether it was against the King or the government, according to the liberal interpretation of the times. The judges being defenceless and dependent, were compelled to court the favour of the sovereign, by adopting a rule of conduct in their decisions, at once arbitrary and unlimited. These constructive treasons varied in [12] different reigns, according to the security of the monarch's crown, the turbulence of his barons, or the power of his opponents. But at all times the smallest breach of allegiance, a term of no positive meaning, was punished as treason.

Exercising, or as it was called *accroaching royal power, and subverting the realm*, seem to have been the general charges. But what was accroaching and subverting, or what defence to make, no man could tell.¹ In the reign of Edward the First appealing to the *French* courts, in opposition to the king's, was in parliament solemnly adjudged high treason, in the case of *Nicholas Segrave*.² In the reign of Edward the Second, the *Spencers* were accused of accroaching royal power.³ This was one, though an inferior charge against *Roger Mortimer*, in the following reign. Sir *John Matravers* [13] was attainted of treason for killing the king's uncle.⁴ A knight was indicted for treason, for assaulting and robbing another on the highway; he was not convicted, but judgment was given, against his companions.⁵ Piracy by one subject upon another, and killing the king's father, brother, or even a messenger, fell under the same determination; and it

¹ 1 Hale 79, 80.

² Id. 80. ³ Sta. Tri. 305.

⁴ 1 Hale 80. ⁵ Blac. Com. 76.

³ Inf. 7. 1 Hale 79.

⁴ 1 Hale 82. ⁵ Inf. 7.

It was admitted that an appeal of treason lay, for the killing one, with malice prepense, who was sent to assist the king in his wars.¹

This great latitude allowed by the common law, of enhancing offences into the crime and punishment of treason, had been abused by the courts, in these and many other arbitrary decisions, and had for a long time terrified and harraressed the kingdom. The will of the judge was law, and frequently even the shadow of a legal trial was denied. At length was enacted, after frequent complaints and petitions from the commons, the popular statute of the 25 of *Edward the Third*; a statute so mild and merciful, and from a sad remembrance of past decisions, so propitious to the subject, that it was received by the nation with affection and gratitude. This statute is indeed momentous; it defines the limits of treason with jealous circumspection, forbidding a trial, without a crime, and a condemnation, without a legal verdict. [14]

Treason by the
25 Ed. 3.

II. The treasons declared by the 25 *Ed. 3. stat. 5. c. 2.* are, "when a man doth compass or imagine
"the death of our lord the king, or of our lady the
"queen, or of their eldest son and heir; or if a man
"do violate the king's companion, or the king's
"eldest daughter unmarried, or the wife of the
"king's eldest son and heir; or if a man do levy
"war against our lord the king in his realm, or be
"adherent to the king's enemies in the realm, giving
"them aid and comfort in the realm or elsewhere, [15]
"and thereof be provably attainted of open deed, by the
"people of their condition. And if a man counterfeit
"the king's great or privy seal, or his money; and
"if

¹ 1 Hawkins 7. 3 Inst. 8.

“if a man bring false money into this realm, counter-
 feit to the money of *England*, knowing the money
 to be false, to merchandize or make payment, in
 deceit of the king and his people. And if a man
 flea the chancellor, treasurer, or the king’s justices
 of the one bench or the other, justices in *eyre*, or
 justices of assise, and all other justices assigned to
 hear and determine, being in their places, doing
 their offices.”

From a review of this statute, it will appear, that
 the treasons relate either to the king’s person, or
 family, to his seals, to his coins, or to his office in
 the administration of justice.

- [16] Counterfeiting the king’s seals, or coins, being
 rather a branch of the *crimen falsi*, or forgery, than
 a species of the *crimen læsæ majestatis*, or high
 treason, will not be the subject of discussion. Neither
 will that part of the statute be treated of, which is
 calculated to preserve the royal issue from bastardy.
 The remaining species are four.

1. Compassing, or imagining the king’s death.
2. Levying war against the king.
3. Adhering to the king’s enemies.
4. Killing the chancellor, or other officers of
 justice.

1. “When a man doth compass or imagine the
 death of our lord the king, or of our lady the
 queen, or of their eldest son and heir.”

The king must be in actual possession of the crown. Who is a king
within the act.
 A prince, succeeding to the crown by descent, or by
 a previous designation of parliament, is from the mo-

- [17] ment his title accrues, a king within the act: a
 coronation being only a notification of the descent
 of the crown; all its prerogatives being legally
 vested, in the person of the king, antecedent to that
 solemnity

solemnity.¹ A king *de facto*, only, is the object of treason;² a king *de jure*, one who has a right or title to the crown, without possession, has no claim to allegiance, for it has been well observed that protection and allegiance are reciprocal terms.³ Henry the Sixth was an usurper, but being in possession of the sovereignty, was protected by the act. Sir Matthew Hale thinks an act of hostility, against the possessor of the crown, *in favor of the rightful heir*, not to be treason;⁴ Sir Edward Coke says, that if treason is committed against a king *de facto* only, the king *de jure*, afterwards coming to the throne, may punish the treason done to the king *de facto*.⁵ And Sir Ralph Gray was punished in [18] the reign of Edward the Fourth, for treason committed against Henry the Sixth. The 11th of Henry the Seventh, chap. 1. enacts "that from thenceforth no person that attends on the king, *for the time being*, and does him true and faithful allegiance, shall be convicted or attainted of treason."⁶ After the restoration of Charles the Second, those who kept him out of possession, were guilty of treason.⁷ But the judges had resolved that Charles was king *de facto*, as well as *de jure*, from his father's death, and that no other person, known to our laws, was in possession of any sovereign power. For the long parliament was *determined* by the death of Charles the First, notwithstanding the act that it should not be dissolved but by consent of the two houses;

¹ 3 Inst. 7.² 1 Hale 101, 102, 103.³ 1 Hawkins 10. 4 Blac. Com. 77.⁴ 1 Hale 61, 103.⁵ 3 Inst. 7.⁶ See Sir William Blackstone's interpretation of this statute.⁷ Com. 77, 78. 1 Hawk. 10.⁸ Kelyng. 16. (3rd. ed.) Sir Henry Vane's case.

[19] houses; and no legal authority, but the king's, could call another.¹

If a king voluntarily resigns, or is deemed by parliament to have abdicated, or by actions subversive of the constitution, virtually to have renounced the government, he is no longer protected by the statute. The resignation of Richard the Second was extorted by force, and therefore does not apply; but James the Second renounced holding the crown, upon the terms of the constitution, and actually vacated the throne; consequently, he was no longer king.²

[20] Let us now consider, what is a *compassing* or *imagining* the death of the king. These words are of synonymous and general import; they relate to the purpose and design of the mind, therefore there must be both a traitorous will, and a traitorous act. The accidental killing of the king, without *intention* of doing him harm, is not a *compassing*. As when Sir *Walter Tyrrel*, by command of William Rufus, shot at a deer; the arrow glanced from a tree, and killed the king.³

Compassing the death of the king.

The wicked imaginations of the heart are considered in the same degree of guilt, as if carried into actual execution, but the guilt commences the moment *measures* appear to have been taken, to render them *effectual*,⁴ and the statute has been so strictly followed,

¹ Kelyng. 16, 17. (3rd ed.) 1 Keble's Rep. 316. 1 Hawkins 10. The distinction between a king *de jure*, and *de facto*, is a distinction without a difference, being equally serviceable to all sides, and parties. So it was, in regard to Henry VI. and Edward IV. who were alternately, declared by parliament, rightful kings and usurpers. ² 4 Blac. Com. 78.

³ 3 Inst. 6. 1 Hale 107. 1 Hawk 9.

⁴ Prin. Pen. Law 121.

Overt acts of
compassing.

followed, that where a king has been actually murdered ; not the killing, but the compassing has been laid as the treason, and the killing as an overt act.¹

The statute requires that the traitorous imagination be demonstrated by some open or *overt* act. [21]
Providing weapons, ammunition, or poison, for the purpose of carrying into execution a conspiracy against the life of the king, is an overt act.² Dr. *Lopez*, physician to queen Elizabeth, was executed for conspiring her death ; the overt act, was procuring poison for that purpose.³

If conspirators meet and consult *how* to kill the king, though no scheme is then adopted, this is an overt act. And every person who assents to overtures for that purpose, or by advice, persuasion, or command encourages others to commit the fact, is involved in the same guilt.⁴ Upon the trial of *Cbarnock*, for an attempt to assassinate William the Third, by over-powering the guards, and firing into his coach ; his being present at a meeting, where the time, the place, and the manner, were fixed upon, was held to be an overt act.⁵ This was ruled also, [22]
in the case of *Tongue*, and other confederates, for a conspiracy to kill Charles the Second.⁶ If a man is once present at such a consultation, *previously knowing the design of the meeting*, this is evidence of his approbation. As also, if a man is *twice* present at such a consultation, and neither disapproves of, or reveals

¹ Trials of the 29 Regicides at the Old Bailey, 1660.

² Sta. Tri. 303.

³ 1 Hale 109. 3 Sta. Tri. 818.

⁴ Ld. Bacon's Works, 2 vol. p. 216. and *ante* 6.

⁵ 6 Bacon's Abr. 5 edit. 508, in other editions 5 Bac. Abr. 112. Kelyng. 20. (3rd ed.) Foster 195.

⁶ 4 Sta. Tri. 561.

⁷ 2 Sta. Tri. 478.

reveals the conspiracy. Sir Everard Digby had judgment of high treason for being privy to, and not revealing the Powder plot, though it was not proved, that he either said, or did any thing, at the consultation.¹

Upon the trial of Dr. *Hugh Peters*, contriving and proposing the death of the king, and encouraging others to commit the fact, by discourse, and exhortations from the pulpit, were held overt acts.²

- [23] But the statute is not solely confined to personal plots or assassinations; every wilful and deliberate attempt, that may immediately, or consequentially endanger the life of the sovereign, is within its scope. Therefore a conspiracy forcibly to imprison, till certain demands are complied with, or to depose the king, is a compassing. As was adjudged, in the case of the Earls of *Essex* and *Southampton*,³ these misguided noblemen conspired to seize the Tower, overpower the guards, and surprize the court, with a view to compel queen Elizabeth to call a parliament, and settle a new plan of government.⁴ Upon the trial, the lord steward recommended *Essex* to reveal the plot and solicit a pardon. *Southampton* [24] escaped with imprisonment during Elizabeth's life; and the sceptre of mercy would have been extended to the unfortunate *Essex*, but all his prospects were closed

¹ Kelyng. 21. (3rd ed.)

² This trumpeter of sedition upon a solemn day appointed to seek the Lord, said, that the citizens for a little trading would crucify *Christ*, (pointing to the *red coats* on the pulpit stairs) and release *Barabbas*. And compared the high court of justice to judging the world, at the last day, by the saints.

³ 2 Sta. Tri. 361, 363, 366, 367.

⁴ 3 Inst. 12. Kelyng. 25. (3rd ed.) by all the judges.

⁵ Hawkins 9. 1 Sta. Tri. 198.

⁶ Camden's Elizabeth 630.

closed for ever, by the fatal treachery of the remorseless Lady Nottingham.¹

Upon this trial the judges gave their opinion upon two points. First, that if a subject attempts to put himself into such strength, that the king is unable to resist him, and to compel him to govern otherwise than by his royal authority, it is manifest rebellion. Secondly, that in every rebellion, the law intends as a consequent the compassing the death and deprivation of the king; foreseeing, that the rebel will never suffer that king to live, or reign, who would punish him for his treason and rebellion.²

Levying war,
dec.

Levying war, or an overt act of such *intention*, or of bringing war upon the kingdom, is an overt act of compassing.³ So is *meeting and consulting* to levy war. But since a consultation to levy, is not an *actual* levying, it cannot be brought under that species, where *levying war itself* is treason.⁴ The overt acts laid in Lord *Russel's* indictment were a conspiracy to levy war, and to seize and destroy the king's guards. As to the first, stirring up insurrection and rebellion is constructively only against the king, and could not be a sufficient overt act, to justify an imagination of compassing the king's death. As to the second, it was proved that Lord *Russel* only was present, during a discourse about viewing the posture of the guards; and no actual view was taken. In the opinion of the ablest lawyers, he was illegally convicted,⁵ the evidence being insufficient and contradictory. [25] [26]

Whatever

¹ 5 Hume's Hist. of England 446.

² 1 Sta. Tri. 207.

³ 1 Burrow's Rep. 646. 6 Sta. Tri. 328. Layer's case.

⁴ Kelyng 24 (3rd ed.) 1 Hawkins 12.

⁵ 3 Sta. Tri. 721, 722. See a defence of Lord *Russel's* innocence. Id. 755, 757.

Whatever has a remote tendency, to affect the personal security of the king, is within the statute ; therefore entering into measures, in concert with Foreign powers, to invade the kingdom, is a sufficient overt act. During a war with France in 1690, Lord *Preston* was seized in a vessel at Gravesend, and some papers were found upon him, containing a plan of invasion, in favor of James the Second, and an account of the strength of several *English* forts and garrisons. Lord *Preston* insisted that no overt act was proved, though laid, in *Middlesex*. But, the court held, that taking boat at Surrey Stairs, with an intention of going to *France*, and of carrying the papers there, for the purposes charged in the indictment was a sufficient overt act in *Middlesex*.¹ The overt act in the Duke of *Norfolk's* case was his intended marriage with Mary queen of Scots, and his correspondence with the Duke of Alva, to raise an army, to invade the kingdom. Mary had formerly laid claim to the crown, it was therefore argued, that whoever married her would support her title, and consequently endeavour to depose queen Elizabeth. The letters had no signatures, and were only proved to be the Duke's by reading the confession of an agent, who vouched for their authenticity. This conviction was contrary to all law and justice, being proved to be treason, only by presumptions and inferences.² Sir Walter Raleigh

Corresponding
with Foreigners
to invade the
Kingdom.

[27]

¹ 4 Sta. Tri. 410, 447. Lord Preston's indictment was for compassing the king's death, and adhering to his enemies.

² 1 Hale 120. 1 Sta. Tri. 85, 103. Mary's attachment to the Duke infused into Elizabeth's breast terror and jealousy ; she therefore proceeded against the Duke with the most unrelenting severity. See Sir Edward Coke's opinion of the 25 Ed. 3. 3 Inst. 12.

leigh was indicted for corresponding with Spain, to advance Lady Arabella Stuart to the throne, and to depose the king. The only proof against him was Lord Cobham, whose evidence was suffered to be read, without confronting the witness to the prisoner.¹ [28]

Inciting a foreign invasion, may seem more properly to belong to another species of treason, that of levying war. But, unless the powers incited are actually at war with this country, it will not fall within any branch of the statute, except compassing the king's death. Since then it certainly tends to endanger his person, it has in strict conformity to the statute been brought within the species of compassing.² So it was ruled in the case of *Harding*, who raised and sent men to France, during a war, for the purpose of restoring James the Second.³ [29]

In the rebellion of Jack Cade, who collected an armed force, and marched to London, for the redress of grievances, it was declared, by the 29 Hen. 6. c. 1. which attainted him of rebellion, that gathering men together, and exciting them to rise against the king, was an overt act of imagining his death.⁴

Words. Formerly treasonable *words spoken*, amounted to an overt act, and two cases are cited in the reign of Edward the Fourth; one of a man living at the sign of the Crown, who told his child, he would make him
heir

¹ 1 Sta. Tri. 213, 216, 220, 226. Raleigh was condemned, but the sword of justice was suspended over his head. He was confined in the Tower fourteen years; afterwards having a commission to Spain, he was unsuccessful, and committed some outrages; when James the First, to oblige the king of Spain, who made a point of it, put the cruel sentence in execution.

² Foster, 197.

³ 2 Ventris's Rep. 316.

⁴ Id. 317.

hair of the crown.¹ The other of Thomas Burdet, who wished the horns of a favourite buck in the belly of him who advised the king to kill it.² But these were arbitrary cases; and because words admit of such an endless variety of constructions, it has been determined that mere loose words not relating to any treasonable purpose in agitation, are not an overt act.³ It was resolved in *Pyne's* case "That no words were treason, unless by some particular statute."⁴ And Sir Edward Coke says, words may "make a man an heretick, but not a traitor, without an overt act."⁵

Thus much of loose words in general; but words may *expound* an overt act, in itself *indifferent*, but when coupled with the words, they may be an exposition of compassing. As were these words, in *Croghan's* case, "I will kill the king, if I may come unto him;" it being proved he came into England for that purpose.⁶ Also these words "the king being excommunicated by the Pope, may be lawfully deposed and killed, by any whatsoever, which killing is not murder."⁷ "If the king should arrest me of high treason I would stab him." "If King Henry the Eighth will not take back his wife, he shall not be king, but shall die."⁸ Also words which manifestly shew a design to kill the king,

¹ 1 Hale 115. 4 Blac. Com. 80.

² Id. *ibid.* Cro. Car. 120, 121.

³ 1 Hale 115, 323. 1 Hawkins 14, 15. Foster 200.

⁴ Blac. Rep. 37.

⁵ Cro. Car. 125. for the words in *Pyne's* case see p. 117.

⁶ 3 Inst. 14. 4 Sta. Tri. 593.

⁷ Cro. Car. 332. Kelyng. 14, 15. (3rd ed.).

⁸ 1 Hale 117. 1 Hawkins 14, 15.

⁹ 6 Bac. Abr. 511. 3 Mod. Rep. 52, 53. Rosewell's Case.

king, make an overt act, though the design be future and conditional.

But words *written and published*, either in letters or books, will make an overt act, if the matter contained, *imports a compassing*.¹ As was *Twyn's* case for publishing "a treatise on the execution of justice" [32] asserting, that the supreme magistrate was accountable to the people, and that they might take arms, to put the king to death.² Also in the case of *Williams* for enclosing and sending in a box, to Charles the First, a book, declaring that the king should die in the year 1621, and that the kingdom should be destroyed.³ Publishing a book, or sending a letter, inciting a foreign invasion, is an overt act; for the death of the king would probably be the consequence.⁴

Even writings *unpublished*, have sometimes convicted their authors of treason. Such was *Peacham's* case in whose study was found a manuscript sermon, which had never been preached or published; he was [33] not executed, for Sir George Croke tells us "many of the judges were of opinion, it was not high treason."⁵ *Algernon Sidney's* case was much harder. He was one of the conspirators, engaged with Lord Ruffel, in the Rye-House plot, to assassinate Charles the Second; only

¹ 3 Inst. 14. Hale 118.

² 2 Sta. Tri. 527, 536. Id. 8. 386. Kelyng. 27. 28. (3rd ed.).

³ 1 Roll's Rep. 88. Cro. Car. 125. In this case was first broached that famous doctrine, *scribere est agere*.

⁴ 3 Inst. 14. Cardinal Pole's Case. 6 Bac. Abr. 5th edit. 510; in other edit. 5 B. Abr. 113. See several cases, for words written and spoken in Croke Charles, from p. 117. to p. 125.

⁵ Cro. Car. 125. upon this trial, 1 Hale 118. See the unconstitutional interference of the king, and the prostituted submission of the judges. Foster 199, 200. 1 Hawk 13. in notis.

only one witness, Lord Howard, deposed against him, and the law required two; his closet was searched, and a discourse, evidently written many years before, in which it was maintained that kings were accountable to the people for their conduct, was deemed equivalent to a second witness. To this stratagem he fell a sacrifice, but it was to the general discontent of the nation, and to the eternal disgrace of the sovereign.¹

- [34] 2. "If a man do levy war against our lord the king in his realm." There must be an actual levying proved by an overt act.² A conspiracy or consultation to levy war, or to provide weapons for that purpose, is not a levying within the statute. But if the rising be effected, both conspirators and actors are guilty of high treason.³ The actual assembling of numbers, to do an unlawful act, is not a levying, if the insurgents are not arrayed in a warlike manner.⁴

Levying war.

- [35] The levying must be *against the king*, which is direct, against his person, or constructive, against his government. It extends not only to those, who take up arms, with intent to dethrone the king, but to those who forcibly endeavour to reform the religion, or laws, or to redress national grievances, this being a defiance of

¹ 3 Sta. Tri. 794, 807, 815. However criminal Sidney's intentions against the king might have been, he was illegally convicted. His idol was a commonwealth; and though his writings were, perhaps, too repugnant to *monarchical* principles, yet "a man may be allowed to keep *poisons*, in his closet, but not publicly to vend them, as cordials." For remarks on Sidney's trial, see 4 Sta. Tri. 196. This was the first indictment for high treason, upon which any man lost his life for writings *unpublished*. Id. 197. 1 Siderfin 419.

² 5 Sta. Tri. 37. 1 Hale 148. 3 Inst. 10.

³ 1 Hale 131, 133. 3 Inst. 9. Foster 213.

⁴ 1 Hale 131. This is doubted of by Foster 208, 213.

of government, and an attack upon the authority of the king.¹ In *Bradshaw* and *Burton's* case, a conspiracy in Oxfordshire, to rise and procure arms, in order to throw down inclosures, and to enlarge highways and lands, was held treason. But they were indicted upon the 13 Eliz. c. 1. which makes a conspiracy, to levy war, treason.²

Insurrections to throw down *all* inclosures, to enhance the price of *all* labour, or to open *all* prisons, is a levying, because of the universality of the design, [36] being an open forcible attack upon government.³ An insurrection for the expulsion of foreigners in general, or for the redress of real or imaginary evils, of a public nature, in which the insurgents have no special interest, is a constructive levying.⁴ So also is aiding and assisting rebels, or attending the leaders, from the beginning, even without being privy to the design of rising.⁵ An insurrection to raise the price of servants' wages is a levying, because being done in defiance of the statute of labourers, it is done in defiance of the king's authority.⁶

At a trial at the Old Bailey, 20 Car. 2. Pulling down bawdy-houses, breaking open prisons, and letting prisoners loose, was held a levying of war.⁷ The [37] cases of *Damarree* and *Purchase*, for destroying the meeting-

¹ 1 Hawkins 11, 12. Prin. Pen. Law 130, 131. 8 Sta. Tri. 289.

² 3 Inst. 10. 1 Hale 132. Popham's Rep. 122.

³ Foster 211. 1 Hawkins 11 and 12. 4 Blac. Com. 82.

⁴ Foster 211.

⁵ 1 Hawkins 12.

⁶ 6 Bac. Abr. 5th edition 513. In other editions 5 Bac. Abr. 117. 3 Inst. 10.

⁷ Kelyng. 70, 108, 112 *et seq.* (3rd ed.). 1 Siderfin 358. 1 Ventris 251. A special verdict was returned. All the judges met, and were of this opinion except Sir Matthew Hale. 8 Sta. Tri. 218, 285.

meeting-houses of the Protestant dissenters, were ruled by the principle of the universality of the design of the conspirators; it was proved, there was a general cry of *down with the meeting-houses*; that one was destroyed in Lincoln's-Inn Fields, and it was then agreed to proceed to demolish the *rest* of the meeting-houses. The Court was of opinion it was high treason. Here was a rising avowedly to demolish *all* meeting-houses in general. Had the meeting-houses been illegal, it would have been treason, according to the case of demolishing all bawdy-houses; but the meeting-houses were protected by the Toleration act, therefore the insurrection in the present case was an attempt to render that act ineffectual, by numbers and force.¹

[38] So, an attempt by force and intimidation, to compel the repeal of a law, was laid down by the whole Court of King's Bench, to be levying war against the king, in the case of *Lord George Gordon*, for assembling a multitude of people, who by his encouragement, committed many acts of violence, and burnt several Roman Catholick chapels.²

An insurrection, the ground of which is a *private* quarrel, is not treason, though acts of violence ensue. As when two great barons, with an armed force attacked and ravaged each other's persons and lands.³

[39] A rising to remove a *private* particular grievance, as to pull down an enclosure, intrenching upon a right of common, is not treason, but a great riot.⁴ Neither was a rising of men of the same trade, unarrayed in

¹ 8 Sta. Tri. 222, 247, 289. Foster 214, 215.

² 2 Doug. 590. The act was 18 G. 3, c. 60, for relieving Papists from certain penalties and disabilities.

³ The case of the Earls of Gloucester and Hereford 20 Ed. 1. 1 Hale 141 in notis and 149, 4 Blac. Com. 82.

⁴ 3 Inst. 9. Kelyng 114. (3rd ed.).

a warlike manner, to redress a private grievance. As was the case of the weavers in London, who tumultuously assembled to destroy the engine looms, and committed great outrages.¹

Holding a fort or castle against the king's forces; or detaining them; or delivering them up, by treachery, or combination, to rebels, is levying war. So is attacking the king's forces, upon a march, or in quarters, in opposition to his authority.²

And in *Bensted's* case, 16 Car. 1. going in a tumultuous and warlike manner, to surprize at Lambeth, the Archbishop of Canterbury, a privy councillor, was adjudged treason.³ [40]

Lastly, the place must be *in his realm*, the narrow seas are part of the dominions of the crown of England, therefore if any subject hostilely invades the king's ships upon those seas, it is levying war within the realm.⁴

Adhering to
enemies.

3. "If a man be adherent to the king's enemies in his realm, giving them aid or comfort, in the realm, or elsewhere." By enemies are meant, *aliens* in notorious hostility; for rebellious subjects are traitors. The solemnity of a previous denunciation of war, is not always necessary, as in the instance of general letters of marque and reprisal; and is sometimes impossible,⁵ as in the emergency of a sudden invasion. [41]

Thus

¹ 1 Hale 143, 144, 145. Foster 210. Upon a consultation of the judges, five were of opinion this case was within the statute, the other five were of a contrary opinion. But the Attorney General proceeded against them for a riot only.

² Broke's Treason, p. 24. Foster 219. 1 Hale 146, 168, 169.

³ Cro. Car. 583. W. Jones's Rep. 455, S. C.

⁴ 1 Hale 154, 170. Co. Lit. 260.

⁵ Princ. Pen. Law 136. 1 Hale 163. 1 Hawk. 12.

Thus the Scots who invaded the kingdom, in the reign of Elizabeth, were held to be the queen's enemies, though at that time there was no war between England and Scotland.¹

There must be an actual adherence ; a conspiracy to aid or comfort the king's enemies is not within the act ; but if the assistance is afterwards actually given, it is.² If pirates or robbers, subjects of a foreign state, in amity with us, invade our coasts, giving them assistance, is adhering to the king's enemies.³ But to relieve a rebel fled out of the kingdom, is not an adherence, for the statute is taken strictly, and a rebel is not an enemy.⁴ Detaining or delivering up a fort [42] or castle, to enemies, is an act of adherence.⁵

If there is a war between England and France, Englishmen living in France before, and continuing there after the war, are not solely on that account adherents to the king's enemies, unless they assist in the war. But a refusal to return upon a mandatory writ under the king's seals,⁶ or upon proclamation and notice in England, is evidence of adherence.⁷

If a subject of a foreign state, living in England under the king's protection, and continuing so after proclamation of war, secretly assists the state at war, either before he leaves the kingdom, or openly renounces his allegiance, he is an adherent within the [43] act.⁸ Procuring a man to be enlisted, and sending him into

¹ Duke of Norfolk's Case. 3 Inst. 11.

² 3 Inst. 9. 6 Bac. Abr. 5th edition, 516, and in other editions 5 B. Abr. 118.

³ 4 Blac. Com. 83.

⁴ 1 Hawkins 13. 4 Black. Com. 83.

⁵ Foster 219. 1 Hawk. 12.

⁶ 1 Blac. Com. 266.

⁷ 1 Hale 165.

⁸ Dyer 144. 1 Hale 165.

into the service of a state at war with us, is an overt act of adherence; so also if a man inlists himself.¹ And upon the trial of Captain *Vaughan*, accepting a commission from France, at enmity with us, and cruising in order to attack and take the king's ships, was of itself, without any other act of hostility, held an adherence.²

If a subject of England makes actual war on the king's allies, engaged against a common enemy, which has been frequently the case of the States-General, in our wars against France, this is an adherence, though no act of hostility is committed against the king or his forces; for the king's enemies are thereby encouraged and strengthened.³ If the states are in alliance, and the French at war with us, those Dutchmen who accept a French commission are the king's enemies; for their subjection to France makes them French subjects, as to all other nations but their own; and if a subject of England assists them, cruising at sea, he is not a pirate, but a traitor.⁴ [44]

Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, or sending intelligence of the destination of our enterprizes or armaments, is treason. This was the case of *De la Motte*, who corresponded with the French ministry, and sent information of the force, destination and signals of the fleet.⁵ The bare sending is sufficient, though the necessaries sent, or correspondence, are intercepted, for the treason is complete on the traitor's part. As was

¹ 2 Salk. 635.

² 5 Sta. Tri. 37. 2 Salk. 634, S. C.

³ So held by Lord Holt in *Vaughan's Case*, 5 Sta. Tri. 36. Foster 220.

⁴ 2 Salk 635.

⁵ At the Old Bailey, 1781. 1 Hale 94. 21 St. Tr. (by Howell) 687.

[45] was the case of *Greg*, a clerk in secretary Harley's office, for sending intelligence to one of the prime ministers of France, of the proceedings of both houses of parliament, in relation to the augmentation of our forces; the letters were stopped at the post office, but the judges resolved, that writing and sending letters to the post office, in order to be delivered to the enemy, was an overt act both of adhering and compassing.¹ The same was determined in *Dr. Hensley's* case, where a letter was intercepted, betraying the secrets of government, and advising and soliciting the enemy to invade the kingdom.²

4. "If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, [46] "doing their offices." These high officers are protected by the act, on account of their superior station, being the personal representatives of the sovereign in his courts of justice. The statute extends only to actual killing. Striking or wounding one of these officers, though in the execution of his office, is not treason. Neither is a conspiracy to kill, but if one of the conspirators actually do it, all the abettors and counsellors are involved in the same guilt.³

Killing the chancellor, &c.

No other great officers, but those expressly named, are protected by the act; therefore, the barons of the exchequer, as such, or the chancellor of the exchequer, are not included. A justice of peace is not a justice of oyer and terminer, unless he sits by virtue of that commission. The lord keeper, if there is a lord chancellor

¹ At the Old Bailey 1707. 10 Sta. Tri. Appendix 77, 78.

² 1 Bur. Rep. 649, 650. Trin. 31 G. 2.

³ 1 Hale 230. 4 Blac. Com. 84.

cellor, is not within the act; but otherwise, if there is no lord chancellor.¹

Lastly, they must be in their *places, doing their offices*. [47] Wherever the seal is open, in the court of chancery, or in the chancellor's house, there the chancellor is administering justice. The places for the justices are the several courts where they usually, or by adjournment, sit for despatch of business. The lord treasurer's place is the court of exchequer, or exchequer chamber. But it is doubted, whether he is sitting in his place, when doing business in his own house.²

Treasons by
subsequent
statutes.

III. By a provisory clause in the 25 *Ed. 3.* "be-
" cause many other like cases of treason may happen,
" in time to come, which cannot be thought of, or
" declared at present, it is accorded, that if any other
" case supposed to be treason, happens before any [48]
" justices, the justices shall not go to judgment of
" the treason, till the king and parliament have de-
" clared, whether it be treason or felony." This clause
is a great security to the subject, a direction to the
judge, and a safeguard even to this sacred act itself.
Sir Matthew Hale admires the wisdom and care of
parliament, in thus keeping judges within the express
limits of the act, and not suffering them to run out,
upon their own opinions, into constructive treasons,
even in cases, seemingly analogous, but to reserve
them for the decision of parliament. This too is a
weighty

¹ 1 Hale 231. 1 Hawkins 19. 6 Bac. Abr. 5th edition, 525; in other editions 5 B. Abr. 126. By 7 An. c. 21. s. 8. to kill any of the lords of session, or judiciary of Scotland, in the exercise of their office, is high treason. The commissioners for the custody of the great seal, or of the treasury, are protected by 5 Eliz. c. 18. and 1 W. & M. sess. 1. c. 21.

² 1 Hale 232.

weighty *memento* to the judges, to be careful and not over hasty in letting in treasons, by construction or interpretation, that are not within the letter of the law : at least in such new cases as have not been resolved and settled by more than one precedent.¹ The authoritative decision of these *casus omitti*, is reserved to the king [49] and parliament, and the most regular way of doing it, is by a new declarative act. And though some particular cases have been declared by the house of lords alone, though decisions of great weight, they are not determined according to that solemn declaration referred to by the act, as the only criterion for judging of future treasons.²

This declarative and interpretative power, thus transferred from the judges to the parliament, was reposed in hands, equally willing and able to determine, without law or precedent. During the ill-fated reign of Richard the Second, the legislature declared many new and extravagant treasons, with thoughtless profusion. In the great appeal in parliament by the duke of Gloucester against the archbishop of York,³ exercising supposed acts of royalty, causing [50] improper laws to be enacted, and impoverishing the revenue, were declared high treason. Killing an ambassador, and the bare intent of killing or deposing the king, without the demonstration of any overt act, were amongst the arbitrary decisions of this reign, which can be justified only on the principle of necessity ; the desperate disease of the state, requiring a desperate remedy.⁴

Henry

¹ 1 Hale 259. 4 Blac. Com. 85.

² The case of the earl of Northumberland 5 Hen. 4. and Talbot 17 Ric. 2. ³ 1 St. Trials, p. 1.

⁴ 1 Hale 263. 266.

Henry the Fourth saw the mischief of these overstrained proceedings, and with a view to court popularity, passed an act,¹ that since "no man knew how " to behave himself to do, speak, or say, for doubt of " the pains of treason, in future, no treason should be " judged, otherwise than by the 25 *Ed. 3.*" This act at once swept away the whole load of unwarrantable treasons, introduced in the preceding reign, and was faithfully observed by Henry. It is remarkable that when Tresilian and other judges were attainted in this parliament, for delivering these strange and extrajudicial opinions, they answered, that they durst not do otherwise, for fear of death.² [51]

In the reign of Henry the Fifth and Henry the Sixth, manslaughter, robbery, breaking truces, and the abetting such acts, were declared to be treason against the king's crown and dignity. And John Mortimer had judgment pronounced, for escaping from prison, being committed for suspicion of treason against Henry the Fifth.³

In the reign of Henry the Sixth, Edward the Fourth, and Richard the Third, many acts of attainder appear, of particular persons, who adhered to either party contending for the crown; according to the success of each.⁴

To detail the various personal and domestic treasons, invented by the pliable parliaments of the tyrant Henry the Eighth, would be painful and uninteresting. That amazing heap of wild and new-fangled treasons was totally abrogated by the 1 Mar. c. 1., which once more reduced all treasons to the standard of the 25 *Ed. 3.*⁵ [52]

From

¹ 1 Hen. 4. c. 10. 1 Hale 266.

² 3 Inst. 22, 23.

³ 1 Hale 267, 268.

⁴ 1 Hale 271.

⁵ 4 Blac. Com. 86, 87.

- From that to the present time, many new treasons have been created by parliament, particularly in regard to Papists; maintaining the power of the Pope; and falsifying the coin. There is one statute however, 2 & 3 Ann. c. 20.¹ which makes any officer or soldier guilty of high treason, who corresponds with the queen's enemies, or gives them advice or intelligence, or enters into any treaty or condition, without proper authority. As to the other treasons it will be sufficient to notice those only, which are created for the security of the Protestant succession, in the house of Hanover. By the 17 G. 2. c. 39. Adhering to or corresponding with the Pretender or his sons; or by the 1 Ann. stat. 2. c. 17. maliciously endeavouring to hinder the person next in succession, according to the limitations of the act of settlement, from succeeding to the crown; and by the 6 An. c. 7. maintaining that any person has a right or title to the crown, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament, are not able to make statutes to bind the crown, and the descent thereof; these offences are declared high treason. This last was the statute upon which *Matthews* was convicted, for printing a treasonable pamphlet, maintaining that the Pretender had an hereditary right to the crown of Great Britain.²
- [53]

- The punishment of high treason is terrible and complicated; the crime being immediately levelled at legislators and legislation.³ 1. The offender is to be drawn to the gallows on a sledge or hurdle. 2. He is to be hanged by the neck, and cut down alive.
- [54]

Punishment of treason.

3.

¹ 1 Hawk. 32. 1 Hale 339.

² At the Old Bailey 1719. 9 Sta. Tri. 683, 684.

³ Princ. Pen. Law 146.

3. His entrails are to be taken out while he is alive. 4. His head is to be cut off. 5. His body is to be divided into four parts. 6. His body and head to be at the king's disposal.¹

The sentence of women is to be drawn and burnt; but a late statute has changed the burning into hanging.²

The king may pardon all the punishment except beheading; for decapitation being part of the judgment, the law is satisfied, and the judgment substantially executed.³ At Lord *Strafford's* execution, [55] it was contended by Lord Ruffel, that the king could not remit any part of the sentence. But when the same Lord Ruffel in his own case applied for pardon, the king remitted the more ignominious part of the sentence. "Lord Ruffel," said he, "shall find, that I am possessed of that prerogative which, in the case of Lord *Strafford*, he thought proper to deny me."⁴

Principals and
Accessories.

There are no accessories in high treason, all are principals, for on account of the enormity of the crime, the law allows of no discrimination of guilt; those who conspire, aid, or abet the committing of any treason, whether present or absent, are all principals.⁵ But this applies only to those cases where the *intent* itself is treason, as in compassing, for in the inferior species, no advice to commit them unless they are actually committed, will make a man a principal traitor.⁶ Every one who *knowingly* receives or com- [56]
forts

¹ 4 Blac. Com. 92. See Sir E. Coke's horrid and merciless description of the sentence, in the presence of seven criminals he was condemning. 1 Sta. Tri. 243.

² 30 G. 3. c. 48.

³ 8 Hume's Hist. Eng. 193.

⁴ 4 Blac. Com. 35, 36.

⁵ 1 Hale 351.

⁶ 1 Hale 233.

forts a traitor is a principal ; as was resolved upon the attainder of *Abington*, for receiving Garnet the Jesuit, a conspirator in the powder plot. But Mrs. *Lisle's* sentence was illegal : the act reversing her attainder, reciting, “ that she was by an irregular and “ undue prosecution indicted for entertaining and “ concealing John Hicks, a false traitor, knowing him “ to be such, though the said Hicks was not at the “ time of the trial attainted or convicted of any such “ crime.” ¹

CHAP.

¹ 4 Sta. Tri. 130. Foster 345, 346.





CHAP. II.

[57]

Of Misprison of Treason.

Misprison of
treason.



MISPRISIONS are such high offences as are not capital, but nearly bordering thereon. And are of two kinds; negative, which is concealing something which ought to be revealed; and positive, which is committing some unlawful act.

Misprison of high treason is either by the common law or by statute, it consists in the bare knowledge and concealment of treason; without any degree of assent: for assent or approbation make the party a principal traitor.¹

In the time of Bracton, concealment of high treason amounted to treason. But afterwards by the 1 & 2 Phil. & Mar. c. 10. §. 8. it was declared, that concealment of high treason shall be deemed misprison only, and the offenders shall suffer and forfeit as in cases of misprison.² [58]

By the old common law, if a man was privy to a treason, he was bound to reveal it to the king or his council within two days, even to the neglect of his most

¹ 4 Blac. Com. 120.

² 1 Hale's P. C. 372.

most urgent affairs ; and if after that time he concealed it, it was deemed an assent.¹ If a person goes into the company of conspirators, not knowing of their design, and hears their discourse without saying any thing, and never afterwards attends their consultations, such concealment is misprision.²

[59] To make a misprision, there must be a *knowledge* of treason, for a man cannot be said to conceal what he does not know. Therefore if a man is told there will be a rising, without being made acquainted with the persons who are to rise, or with the nature of the plot, this is no misprision in him, for he had no actual knowledge of treason. But if a man knows of a treason, and some of the conspirators, and talks to other men about it in general terms only, this will not acquit him of misprision ; for notwithstanding the discourse, the treason and traitors are still concealed.³ Compassings or imaginations against the king by word, without an overt act, constitute misprision. By the 25 Hen. 8. c. 12. *Fisher* Bishop of Rochester was attainted of misprision, for concealing certain predictions made against the king, by the famous visionary, the Holy Maid of Kent ; one of whose prophecies denounced, that if the king did not desist from his intended divorce, from Anne Boleyn, he should [60] not continue king more than a month after.⁴

If an act of parliament subsequent to 1 Mar. c. 1. §. 3. makes a new treason, the concealing of it is certainly misprision. Because misprision not being a substantive crime, it relates to whatever is made treason, and is its necessary consequent and result, as the shadow follows the substance. Though the 25 Ed.

¹ *Braeton*, lib. 3. Fol. 119. a.

² *Kelyng*. 20, 21. (3rd ed.).

³ *Kelyng*, 26, 27. (3rd ed.).

⁴ 11 Sta. Tri. 7.

44 *Of Misprision of Treason.*

Ed. 3. does not by express words enact misprision to be an offence, yet as the 1 Mar. enacts there shall be no misprision but by the 25 Ed. 3. this latter act when it settles those things that are treason, likewise virtually and consequentially makes the concealing any of them misprision.¹

But there are some offences, that are made positive misprisings, without being consequential or dependent upon the making of treason. As by the 13 Eliz. c. [61] 2. s. 5. concealing and not discovering to some of the privy council, within six weeks, the offer of any instrument, or persuasion of reconciliation, to the see of Rome. By the 14 Eliz. c. 3. the forgers of any *foreign* coin, which is not current in this kingdom, and their procurers, aiders and abettors, incur the penalties and forfeitures of misprision of treason. As also, by the 23 Eliz. c. 1. s. 3. the wilful aiders, and maintainers, of those who endeavour to withdraw the queen's subjects from their obedience, or from the established religion.

It is incumbent upon every one who is privy to a treason, to reveal it with all possible expedition to the king, a privy counsellor, or a magistrate.²

But it is doubted, whether a discovery to a private person, not invested with the powers of magistracy, is that publick exculpation which the law requires.³ [62] Neither will it be an exemption from the offence to discover that there will be a rising in general, without disclosing the persons intending to rise.⁴ If treason is disclosed to a confessor, it is his duty to make a discovery, for confession conveys not the privilege of secrecy.⁵ Therefore in the reign of Henry the Fifth,

¹ 1 Hale P. C. 334.

³ Kelyng. 27. (3rd ed.).

² 2 Inst. 629.

⁴ 4 Burn's Justice Tit. Treason.

⁵ 1 Hawkin's P. C. 61.

Of Misprision of Treason. 45

Fifth, *Randolph*, the queen dowager's confessor, accused her of treason.¹ And *Garnet* the jesuit set up an ineffectual excuse, that he was bound to keep secret whatever was disclosed in sacramental confession.²

The *punishment* of misprision is imprisonment Punishment.
during life, forfeiture of all goods, debts, and duties
[63] for ever, and of the profits of lands during life.³
Misprision of *petit* treason is not subject to the judgment of high treason, but is punishable only by fine and imprisonment.⁴

CHAP.

¹ Rot. Parl. Anno 7. H. 5. nu. 13.

² 1 Sta. Tri. 264. 2 Inst. 629.

³ 3 Inst. 36.

⁴ 1 Hale P. C. 375.





*Of Felonies and other Offences against the
King and his Government.*



OTHER offences immediately affecting the king or his government are felonies injurious to his prerogative, *præmunire*, and misdemeanors.

1. *Felony*, according to its general acceptance, comprizes every species of crime, which occasioned at common law, the forfeiture of lands or goods. But it is considered by modern interpretations as a generical term, including all capital crimes inferior to treason.¹ Felonies against the king's *prerogative* are not such offences as directly attack the personal attributes of sovereignty, but tend to diminish the dignity of his political authority, or weaken the sinews of his government. It not being intended to speak of offences relating to the coin or bullion, or of relieving popish priests. The other felonies are, [65]

1. Against the council.
2. Serving a foreign state.
3. Imbezzling stores of war.
4. Desertion from the army or navy.

The

¹ 4 Blac. Com. 98.

The privy council, being a selection of such statesmen as are eminent for their birth, wisdom, or talents, in order to advise and defend the king, and to give energy and stability to his executive government, the law severely punishes any attempt or conspiracy to destroy their lives. The 3 & 4 Ed. 6. c. 5. being repealed, which made the intent to kill or imprison a privy counsellor felony; it is enacted by the 3. Henry 7. c. 14.¹ that if any of the king's household servants conspire or imagine to take away the life of a privy counsellor, it is felony, though nothing be actually done. This statute was made in consequence of a dangerous conspiracy by some of Henry the Seventh's household servants: it therefore extends to the king's sworn servants only, whose names are entered on the cheque-roll of the household, and are under the rank of a lord. By this statute the benefit of clergy is not taken away. But by the 9 Ann. c. 16. it is enacted, that if any person shall unlawfully assault, strike, wound, or attempt to kill any privy counsellor, in the execution of his office, he shall suffer death as a felon, without benefit of clergy. This statute was made in consequence of the daring attempt of the Marquis *De Guiscard*,² who stabbed Mr. Harley with a penknife, when under examination before a committee of the privy council, for traiterously corresponding with France.

Felonies against
the privy council.

- [66] *Serving foreign states* being generally a dereliction of that allegiance which a subject owes to his natural prince, was restrained and punished by the legislature, in the reign of James the First, when the restless machinations of the Jesuits abroad were aimed at the destruction of the government, and the introduction of the

Serving foreign
states.

¹ 1 Hawk. 46.

² Foxt. 271, 275.

the popish religion. By the 3 Jac. 1. cap. 4. s. 18. every subject that goes out of the kingdom in order to serve, or after his departure, voluntarily serves any foreign state, without taking the oath of obedience,¹ prescribed by the statute, is declared a felon. It is also felony, by section 19. If any gentleman or person of higher degree, who has borne any office or place in the army, engages in foreign service, in this manner, without previously entering into a bond with two sureties,² not to enter into, or consent to any plot or conspiracy against the king; and if he knows of any such, to disclose it within proper time to the king, or the lords of the privy council. [68]

Farther by the 9 Geo. 2. c. 30. s. 1. to remedy the seduction of soldiers to enlist for foreign service, it is enacted, that if any subject of Great Britain shall enlist or enter himself; or any person shall procure him to be enlisted or entered; or shall hire, or retain, or procure any subject to go beyond the seas, or embark for the purpose of serving any foreign state, as a soldier, without licence obtained under the king's sign manual; he shall suffer death, as in cases of felony, without benefit of clergy. But by section 3. if any person so enlisted or enticed, shall within fourteen days discover his seducer, so that he may be apprehended and convicted of the offence, this will be an indemnification.³ Moreover, by the 29 Geo. 2. c. 17. [69]
s. 1.

¹ See the oath Sec. 15. This oath of obedience is abrogated by 1 W. & M. Sec. 1. c. 8. s. 2, and the new oaths of allegiance and supremacy enjoined in its room.

² The penalty of the bond is twenty pounds; see the condition Sec. 20. and Sir E. Coke's commentary upon the statute. 3 Inst. 80, 81. 1 Hawk. 47.

³ This act is enforced by 29 Geo. 2. c. 17. s. 4. which adds, although no enlisting money is actually paid or received.

f. 1. if any subject enters into the military service of the French king, as a commissioned or non-commissioned officer, without licence under the king's sign manual, he shall be deemed guilty of felony, without benefit of clergy.¹

[70] *Embezzling or destroying the king's armour, stores, or shipping*, being a crime easily committed, and of fatal tendency, particularly in time of war, is punished by the 31 Eliz. cap. 4.² which declares that if any person having the charge or custody of any armour, ordnance, munition shot, powder or habiliments of war; or of victuals provided for victualling of soldiers or mariners; shall, for the sake of gain, or for the purpose of hindering her majesty's service, embezzle, purloin, or convey away the same, to the value of twenty shillings, at one, or several times, he shall be proceeded against as a felon.³ But because the benefit of clergy is allowed by law, except it is expressly taken away, which was not the case in the preceding statute; and this offence having been frequently committed, the 22 Car. 2. c. 5. §. 2. takes away the benefit of clergy; as also by section 3. from stealing or embezzling any sails, cordage, or other naval stores to the value of twenty shillings.⁴ And by the 22 Geo. 2. c. 33. §. 25. every person in the fleet, who shall unlawfully

Embezzling
stores.

¹ By the same statute, Sec. 5. the accepting a commission in the Scotch Brigade, in the service of the States General, and not taking the oaths of allegiance and abjuration, within six months, and transmitting a certificate thereof and of the commission, to the secretary at war, incurs the penalty of 500*l*.

² 1 Hawk. 50.

³ This act has five excellent provisions, worthy of imitation, in all like cases of new felonies. 3 Inst. 79.

⁴ The judge is empowered, after sentence of death, to transport the offender for seven years.

lawfully burn or set fire to any magazine or store of powder; or to any ship, boat or vessel; or to the tackle or furniture of the same; provided it does not belong to an enemy, pirate, or rebel, shall suffer death; being convicted of the offence, by the sentence of a court martial. Lastly, by the 12 Geo. 3. c. 24. to set on fire, burn, or destroy any ships or vessels of war, whether on float, building, built, or repairing; or any arsenals, magazines, dock-yards, rope-yards, victualling offices; or any buildings erected therein, or belonging thereto; or to any military, naval, or victualling stores, or other ammunition of war; or the places where they are deposited; is felony without benefit of clergy.¹ [71]

Desertion.

For the crime of *desertion*, both the ancient and modern law of England has inflicted the punishment of death.² It is felony by the 18 Hen. 6. c. 19. for any soldier, after receiving his wages, not to join his captain, or to depart from the king's service without proper licence. The 2 and 3 Ed. 6. c. 2. f. 6. takes away the benefit of clergy; but this statute seems to apply only to desertion after a war: but it is taken away by the 7 Hen. 7. c. 1. A subsequent statute which extends the offence to mariners and gunners, does not oust these last offenders of clergy.³ [72]

There is a case in the books, which Charles the First commanded the judges to resolve. A soldier having received press-money, ran away from the conductor, the question was, whether this was felony. It was argued by Sir George Croke, and two judges, that a departure from a *conductor* was not what the statute

¹ For the punishment of other embezzlements see 9 and 10 Wil. 3. c. 41. 1 Geo. 1. Stat. 2. c. 25. 9 Geo. 1. c. 8. f. 3. 17 Geo. 2. c. 40. f. 10. Ld. Raym. 1104.

² 3 Inst. 87.

³ 5 Eliz. c. 5. f. 27.

[73] statute intended, which specifically mentioned a *captain*. But all the other judges determined, that though a penal statute,¹ yet, being made for the benefit of the publick service, it ought to be construed liberally, according to the intent of the makers; and that a conductor was a captain.²

Thus much for desertions in time of war, when it is expedient to establish the severest regulations; but in time of peace, some relaxation of military rigor would not occasion much inconvenience. However the act, which passes annually, "to punish mutiny and desertion," makes no distinction of this kind; for if any officer or soldier at any time deserts, or enlists in any other regiment, he shall suffer whatever punishment a court martial inflicts, though it extends to death itself.³

[74] II. The next offence, though not capital, affecting the king and his government, is *præmunire*.⁴ This, according to its original institution, was of a mere ecclesiastical nature, and consisted in maintaining
and

¹ 7 Hen. 7. upon this statute several soldiers were afterwards attainted and executed. Coke's 6. Rep. 27. a. the case of soldiers. Kelyng. 46. (3rd ed.)

² The soldier's case, Cro. Car. 71, 72. Another doubt arose, that as the felony was appointed to be tried before the justices of peace at their sessions, whether the justices of assize, or of oyer and terminer could try it; though this was not resolved, the general opinion was, that the justices of oyer and terminer might try it by their commission.

³ A like power over the *marines*, is given to the Lords of the Admiralty, by another annual act, for the regulation of the marine forces, while on shore.

⁴ So called from the words of the writ preparatory to the prosecution thereof *Præmunire Facias A. B. causæ A. B.* to be forewarned, that he appear before us, to answer the contempt wherewith he stands charged. But both the writ and the offence are in common speech called *Præmunire*.

and supporting the power of the Pope. The first effectual attempt to restrain the despotic power of the Popes, who reigned as lords of the terrestrial globe, was made in the thirty-fifth year of that wise and vigilant monarch Edward the First; and is the foundation of the subsequent statutes of *præmunire*. But that which is generally referred to as the statute of *præmunire* is the 16 Ric. 2. c. 5. which was intended to prevent the procuring from Rome translations and nominations to benefices.¹ By the 25 Hen. 8. c. 20, [75] s. 7,² if any dean and chapter shall refuse to elect, within twenty days, any person nominated by the king, to be bishop; or any archbishop or bishop refuse to consecrate him; they shall incur the penalties of *præmunire*. This act restored to the king the prerogative of nominating to bishopricks, and yet preserved the established forms of election.

Thus far *præmunire* was kept within its proper bounds, opposing the encroachments of the Pope. But the legislature found it convenient to transfer the penalties to offences of a temporal nature; some of them having no relation to the original mischief. Derogating from the king's common law courts, was a high offence at common law. By the 27 Ed. 3. stat. 1. c. 1. it is *præmunire* for any person to draw any plea out of the realm, the cognizance of which [76] belongs to the king's courts, or to sue in any other court to defeat or impeach the judgments given in the king's courts. In the reign of James the First it was a question; whether a court of equity could give relief, after or against a court of law. The words,

or

¹ Such instruments were called Bulles. Purchasing *provisions*, was when the Pope provided a living, before the incumbent was dead.

² 1 Hawk. 54.

ex sue in any other court, seem to have created the doubt: and indictments were preferred against all the parties in a suit in chancery, for incurring a *præmunire* by questioning, in that court, a judgment obtained in the court of king's bench by fraud and imposition. The decision was given in favour of the courts of equity, notwithstanding the powerful arguments advanced by Sir Edward Coke, who presided in the king's bench, and instituted this inquiry.¹ And certainly, a court of equity being qualified to correct the rigors and inconveniences of the common law, is

[77] prohibited only from examining the judgment; and not from administering relief, in cases where that judgment is obtained through fraud and false suggestions.² Upon this statute an indictment of *præmunire* was drawn against Sir Anthony Mildmay, a commissioner of sewers for committing a man to gaol, for refusing to release a judgment at law, obtained against the commissioners for an illegal taxation.³ It has been said that suits in the Admiralty or ecclesiastical courts, are within the 16 Ric. 2. c. 5. which prohibits any process at Rome or *elsewhere*, if they concern matters belonging to the cognizance of the

[78] common law. But it is the better opinion, that if the matter appears not by the libel itself, but by the defendant's

¹ 3 Inst. 122, 123. Id. 4. 86, 87. 1 Buls. 197.

² This court, notwithstanding the statute, may prevent such judgments from being put into execution. It is a power essentially inherent in a court of equity. And since it has a concurrent jurisdiction with the common law in matters of fraud, Sir E. Coke has been much blamed for his dispute with Lord Ellesmere, and attempting to deprive the chancery of this part of its jurisdiction. See 1 Mod. 59. 2 Keb. 156. Dr. and Stud. Dial. 1. c. 18. and 3 Blac. Com. 54.

³ Cro. Jac. 336. 2 Buls. 299.

defendant's plea, to be of temporal cognizance; as if the plaintiff libels for tithes, and the defendant pleads they were severed from the nine parts, which made them a lay-fee; then it is not within the statute; because it is not apparent, that either the plaintiff or judge knew they were severed.¹

Other *præmunires* are acting as brokers or solicitors in usurious contracts, and taking more than *ten per cent.* interest by the 13 Eliz. c. 8. s. 4.² Causing any stay of proceedings, otherwise than by writ of error or attain, in an action for loss or damage done to goods, under pretext of any monopoly; provided notice is given, that the action is grounded upon the 21 Jac. 1. c. 3. which makes void all monopolies.³ [79] To obstruct the process of making gunpowder, or to prevent the importation of the ingredients of which it is made, by virtue of a pretended authority of the crown, by the 16 Car. 1. c. 21. s. 4.⁴ Or obtaining an exclusive licence for making, or importing gunpowder, arms, or ammunition, by way of merchandize, except for the immediate furnishing his majesty's publick stores by the 1 Jac. 2. c. 8. Seizing the property of another, under colour of purveyance, or impressing any carriage by way of pre-emption by the 12 Car. 2. c. 24. s. 13, 14. Also causing delay in any action brought on this statute, except by authority of the court, where it is depending. Maliciously and advisedly asserting, by speaking or writing, that

¹ 3 Inst. 120, 121. 1 Hawkins 54 (cap. on *Præmunire*). The question must be whether the cause is within the jurisdiction of the courts, and the thing be demandable and recoverable therein.

² Cro. Jac. 252. 1 Hawk. 613.

³ By sec. 4. of this act, the party shall recover treble damages, and double costs. ⁴ 1 Hawk. 624 and 60 in notes.

[80] that both or either house of parliament have a legislative authority, without the king, by the 13 Car. 2. c. 1. To send any subject of the realm a prisoner beyond the seas, or advising or assisting therein by the *babeas corpus* act, 31 Car. 2. c. 2. f. 12. All these are *præmunires*; and this last statute, besides the penalty of five hundred pounds, renders the offenders incapable of any pardon.

In more modern times, by the 1 Will. and Mar. sess. 1. c. 8. Persons of eighteen years of age refusing to take the new oaths of allegiance, and supremacy, prescribed by that act, upon tender by the proper magistrate, are subject to the penalties of *præmunire*. And by the 7 and 8 Will. 3. c. 24. serjeants, or counsellors at law; proctors, attornies, and all officers of courts; practising without taking the oaths of allegiance and supremacy, and subscribing the declaration against popery; whether the oaths are tendered or not. By the 6 Ann. c. 7. f. 2. asserting maliciously and directly by preaching, teaching, or advised speaking, that the then pretended Prince of Wales, or any other person otherwise than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown, is *præmunire*.¹ By 6 Ann. c. 23. f. 10. if the assembly of peers of Scotland, convened to elect their sixteen representatives to sit in the British parliament, presume to treat of any other matter except the election, they incur the penalties of a *præmunire*. By 6 Geo. 1. c. 18. f. 18, 19. all undertakings tending to

¹ We have before seen, that writing, printing, or publishing the same doctrines amounted to *high treason*, by the same statute.

to the prejudice of trade, and subscriptions countenancing such undertakings; or presuming to act as a corporate body without legal authority; or raising, or pretending to raise transferrable stocks, or acting under obsolete charters; such proceedings are illegal and void, and incur the penalties of *præmunire*.¹ [82]

Lastly, by 12 Geo. 3. c. 11. no descendant of the body of George the Second, except the issue of *princesses* married into foreign families, shall be capable of contracting matrimony, without the previous consent of his majesty, signified under the great seal, and declared and registered in council; and every marriage and matrimonial contract, without such consent, is null and void to all intents and purposes whatsoever. But, if any such descendant, who has attained the age of twenty-five, gives notice to the privy council of his intentions, he may, after the expiration of twelve calendar months, contract a marriage, without the previous consent of his majesty, which shall stand good; unless, before the expiration of the said year, both houses of parliament expressly declare their disapprobation of such intended marriage. And [83]

any person presuming to solemnize, assist, or be present at the celebration of any such prohibited marriage, shall incur the pains and penalties of the statute of *præmunire*.

Pains and
penalties.

The *pains and penalties* of *præmunire* are very severe. "After conviction, the defendant is put out of the king's protection; his lands, tenements, goods and chattels are forfeited to the king; and his body is to remain in prison during the king's pleasure."

¹ These undertakings, from the fatal experience of the failure of the South-sea project, were called *Bubbles*. 1 Hawk. 60 in notes.

"pleasure." Such lands as are *entailed*, are saved from forfeiture. By this punishment the offender is put out of the protection of the law, and can therefore bring no action. By the common law there was no punishment for killing a man attainted of *præmunire*, for he might be treated as the king's enemy, and to kill an enemy, was lawful. But the 5 Eliz. c. 1. §. 21. expressly forbids killing any person attainted of *præmunire*.

[84] Whether there can be any accessories in *præmunire* is doubted.¹

III. Misdemeanors are libels scandalizing the king, or his government, or contempts derogating from his title or prerogative.

A *libel* is the malicious defamation of another by Libels.
printing or writing; and exposes him to publick hatred, contempt or ridicule. And since it tends to a breach of the peace, it has been held a publick offence at common law, and received the utmost discouragement from courts of justice.

The star chamber soon after the invention of printing, took to itself the jurisdiction over publick libels; it presently usurped a general superintendency over the press, and exercised a legislative power over all publications:² it prohibited books, it inflicted penalties, it established an *oligarchy* of licensers, and invested them with absolute power to govern the republic of letters. This odious tribunal was abolished in 1641,

¹ Staunf. P. C. 44.

² 7 Sta. Tri. 29, 30, 31. 6 Hume's Hist. Eng. 165, 166. The courts of *Westminster-Hall* did not want the power of holding pleas in cases of libels; but the attorney general for good reasons chose rather to proceed in the court of *Star Chamber*; which is the reason why there are no cases of libels in the *King's Bench* before the restoration.

1641, but the long parliament assumed all its powers, which were continued during the whole time of the protectorship. Two years after the restoration, an act was passed reviving the republican ordinances.¹ This act expired in 1679, but was revived in 1692, and was continued till 1694, when all restraints were taken off, and the press made open and free. The consequence of this liberty of the press has been, gross licentiousness stealing upon the public mind, by gradual but imperceptible advances, till it has terminated in a point, beyond which it cannot go. In the moral world the eye is disgusted with the picture of atheism, obscenity, and ridicule; and in the political, with doctrines subversive of civil society. Governments therefore watch with a vigilant eye, the demeanour of books, as well as men; and execute judgment and justice upon their authors, as upon criminals. For books are not absolutely dead things, but contain a potency of life, and activity of soul, as efficacious as their parent. They possess the vigour and prolific qualities of the teeth of dragons, in the fables of antiquity; wherever they are set, there spring up armed men. [86]

It is not to be presumed that a libel is levelled personally at majesty, it generally attacks the characters of ministers, or the measures of government. But charging the king with a personal vice or defect;² or that he wants wisdom, valour, or prudence;³ or charging him with the breach of his coronation oath, are libels.⁴ Also spreading false rumours concerning the [87]

¹ Against this ordinance Milton wrote his well-known pamphlet *Areopagitica*.

² The king against Almon, M. 29 Geo. 3.

³ Cro. Car. 117.

⁴ Noy 105.

the king's intentions, as that he designs to grant a toleration to papists.¹ If a man attacks the person of majesty by low and licentious scurrility, in verse, he commits an act of audacious indecorum ; and may be punished by a court of justice, with the humiliating and severe pains of the pillory.

[88] Libels against the government or men in power, are the objects of bitter aversion from the laws, not because they investigate the principles of government, or canvass political measures, which with decency and propriety is permitted to be done ; but because they engender sedition ; flatter faction ; propagate fictions and falsehoods ; and impose on credulity. The common causes of libelling are mistaken principles, disappointment, and revenge ; the effects, sedition and discontent among the people. If statesmen are the objects, it will generally appear, that to produce the desired effect, besides the necessary ingredient of falsehood, the private and publick character of the libelled, are artificially blended together ; as if the follies of the drawing room, or the foibles of domestic recreations, had an essential influence on the actions of the senate.

If in private life, the calumniator of reputation, the best pillar of prosperity, be criminal ; much more so is he, who endeavours to destroy, what is the only support of men in publick stations, the confidence of the nation.

[89] Charging the Legislature with corruption ; or asserting that the government is unjust or tyrannical ; or that the ministers are men of no integrity and ability ; or that they have ruined the country, and are enemies to

¹ The case of Alexander Scott for publishing false news, Old Bailey, June 1778.

to the publick good ; are libels against the king's government ; as disseminating discord and disaffection in the minds of his subjects, and bringing into disrepute the administration of affairs. For the energy and strength of a government depend upon the opinions entertained of the wisdom and virtue of its measures ; and no government can stand against popular clamour and disgust. Since the revolution, the pen of sedition has been very busily employed. The case of John *Tutchin* was publishing the following libel, called the *Observer*. That if we judge from our national miscarriages, perhaps no nation in Europe, has felt more the influence of French gold, than England. That we found out offices for men, not men for offices ; and that by this, the excise, customs, and other branches of the revenue, were intolerably sunk ; and that the navy of England had been hitherto perfectly bewitched.¹ The case of Richard *Franklin*, was publishing a letter, in a paper called the *Craftsman*, under colour of an extract from the *Hague*, charging the ministers with an infraction of the *Hanover* treaty, with deserting allies, and perfidiously exposing the country to great hazards and expences.² The trial of *Owen* was for printing and publishing the case of Alexander Murray, Esq; which charged the house of commons with illegal and unconstitutional proceedings, upon the *Westminster* election for members of parliament. The house of commons voted it a libel ; but upon the trial the defendant was acquitted for want of proper evidence.³ And in the case of John *Horne*,

[90]

¹ At Guildhall 1704. 5 Sta. Tri. 527.

² Sitings at Westminster before Ld. Raymond, December 1731. 9 Sta. Tri. 255, 256.

³ 10 Sta. Tri. 197, 198. 208. Appendix.

- Horne*, Esq; the publication of the following passage was a libel. "At a meeting of the *constitutional*
- [91] "*society*, a gentleman proposed that a subscription should be entered into, for the purpose of raising a sum to be applied to the relief of the widows, orphans and aged parents of our beloved *American* fellow subjects, who faithful to the character of Englishmen, preferring death to slavery, were for that reason inhumanly murdered by the king's troops.¹" The dean of *St. Asaph's* case was publishing a pamphlet called "The principles of government, in a dialogue between a gentleman and a farmer," in which it was insisted, that a free state was only a numerous and powerful club; that the people were deprived of the right of voting for representatives in parliament; that in consequence of this, they were robbed of their money: and recommending them to procure arms, and be conversant in the manual exercise, in order to oppose the government, and redress
- [92] grievances.² The case of *Lord George Gordon*, was writing a pamphlet himself, addressed to himself, entitled "The prisoner's petition, to the right honorable Lord George Gordon, to preserve their lives and liberties, and prevent their banishment to Bottany Bay." The purport of the libel was, that the government was tyrannical, the felony laws cruel, and that the judges condemned the people contrary to law.³ Upon the trial of *Stockdale* for publishing "A review
" of

¹ In the King's Bench, Nov. 1777.—11 Sta. Tri. 264. 268. See the proceedings against John Peter Zenger, for a libel upon the government of the province of New York. 9. Sta. Tri. 276.

² The king against the dean of *St. Asaph* for a libel; at the assizes at Shrewsbury, August 1784. 21 St. Tr. 847.

³ At Guildhall 1787. 22 St. Tr. 175 (by Howell). See

"of the principal charges against Warren Hastings, esquire, late governor general of Bengal," the following matter was held a libel on the house of commons. That the more deserving a man rendered himself of his country, the more he was exposed, to the vindictive proceedings of parliament. That the house of commons in impeaching Mr. *Hastings*, had perverted [93] their accusatorial character, and were influenced by motives of personal animosity; and not by the principles of publick and deliberate justice.¹ The last, is a recent case, for a libel upon the revolution, and settlement of the crown, upon the bill of rights, the legislative, executive, and judicial powers; and may therefore properly be termed an *accumulative* libel. The doctrines maintained were that the deliverance of this country by the prince of Orange, introduced only the semblance of liberty; that the regal part of our government was, an oppressive and abominable tyranny; and that the whole legislature was a direct usurpation.²

Contempts
against the
king's title.

Contempts against the king's *title*, are either by denying his title; or refusing to take the oaths required by law for the support of his government. [94] These tend to raise tumults and disorders in the state, and alienate the affections of the people.

If a man in heedless and unadvised discourse maintains, that the king is an usurper; or that another has a better title to the crown; or that the common laws

also the trial of Thomas Wilkins for printing and publishing the foregoing libel. Douglas 590. 1 East P. C. 117.

¹ In the court of king's bench Westminster, December 1789, before Lord Kenyon. 22 St. Tri. 237 (by Howell).

² Proceedings against Thomas Paine, at Guildhall, December 1792, before Lord Kenyon, and a special jury. 22 St. Tri. 357 (by Howell).

laws of the realm, not altered by parliament, ought not to direct the descent of the crown of England; these are high contempts, inclining to favor the pretensions of others, and shaking the stability of government.¹

[95] By the 1 Geo. 1. stat. 2. c. 13. every person who is admitted into any office civil or military; and all members on the foundation of colleges or halls in the two universities, who shall have attained the age of eighteen years; and every person acting as a serjeant or counsellor at law; as an attorney, solicitor, or as an officer in any court of justice in England; shall take and subscribe the oaths of allegiance, supremacy and abjuration at one of the courts of Westminster, or at the general quarter sessions of the peace where they shall reside.

And it is enacted by sects. 16 & 17 that no peer shall vote or make his proxy, or sit in the house of peers, during any debate: and that no member of the house of commons, shall vote or sit, during any debate in the said house after the speaker is chosen, until he shall have taken the above mentioned oaths.

[96] By sect. 10. of this act two justices of the peace, or any other persons specially appointed by his majesty, by order in the privy council, or by commission under the great seal, may tender these oaths to any person, they shall suspect,² to be dangerous or disaffected to his majesty or his government; and they shall certify the refusal of any person to take the oaths, to the next quarter sessions, which shall from thence
be

¹ 1 Hawk. P. C. 67. If the discourse is advised it amounts to *præmunire*.

² It seems that a bare suspicion is not sufficient, there must be some good cause of suspicion, which is traversable. 1 Hawk. P. C. 70.

Contempts
against the
king's preroga-
tive.

be certified, by the clerk of the peace of the county, into the court of Chancery or King's Bench.

Contempts against the king's *prerogative* consist in refusing to assist him for the good of the publick ; espousing the interests of a foreign state ; or disobeying his lawful commands, or prohibitions.

It is a great contempt for any subject to deny the king that assistance in his councils or wars, which by law he is bound to give ; as for a peer not to come to parliament at the day of summons ; or for a privy counsellor to refuse giving his advice on affairs of state ; or for any private subject to refuse serving the king in person, if he is able, or to find another, if he is unable, for the defence of the kingdom, against rebels or foreign invaders. Also neglecting to join [97] the *posse comitatus*, or power of the county, being required so to do, by the sheriff or justices, according to the statute 2 Hen. 5. c. 8. which is a duty incumbent upon all, that have attained the age of fifteen years, are under the degree of nobility, and able to travel.¹

The doing or receiving anything, that may create an undue influence, in favor of foreign powers ; as taking a pension from any foreign state, without the king's license, even though they are in amity with us, is a contempt against the king's prerogative.²

Disobeying the king's lawful commands, or prohibitions, or his writs issuing out of the courts of justice ; or refusing to answer questions proposed by the privy council, respecting the interest of the state ; or refusing to give evidence to a grand jury concerning a crime ;³ or not returning from beyond the seas, upon the [98]

¹ 3 Inst. 144. See articles exhibited against cardinal Wolsey. Art. 27. 4 Inst. 92.

² Hawk. P. C. 65. ³ 1 Salk. 278. Lord Preston's case.

the king's letters for that purpose ; or going beyond the seas, against the king's will expressly signified, either by the writ of *ne exeat regnum*, or under the great or privy seal, or by proclamation.¹ All these are contempts against the king's prerogative.

The punishment of these misdemeanors is fine, pillory, and imprisonment, at the discretion of the court ; according to the greatness of the offence, the circumstances of the case, and the rank of the parties : and sometimes disabilities to hold offices and places.

Punishment.

CHAP.

¹ 3 Inst. 179, 180. This writ may be directed as well to a layman, as to a clergyman, and upon the suggestion of a private or public matter. 1 Hawk. P. C. 65.





*Of the Proceedings in Cases of High
Treason, &c.*

THOUGH the offence of treason is not within the letter of the commission of justices of the peace, yet because it is against the peace of the king and of the realm, any justice may upon his own knowledge, or the complaint of others, cause any person to be apprehended, and commit him to prison. And the justice may take the examination of the person apprehended, and the information of those who can give material evidence against him, and put the same in writing, and also bind over those, who can give any material evidence, to the justices of *oyer and terminer*, or gaol delivery; and certify the proceedings to that court where he binds over the informers. [100]

A justice having no power to bail the offender, must commit him: and it may be advisable to send an account immediately to a secretary of state. The court of king's bench having power to bail in all cases whatsoever, may admit a person to bail for treason

treason done upon the high seas;¹ or a person committed for high treason generally, if four terms have elapsed, and no prosecution commenced.² The commitment may be for high treason generally; and it is not necessary to express the overt act in the warrant.

The regular and legal way of proceeding in cases of treason, and misprision of treason, is by indictment. An information cannot be brought in capital cases, nor for misprision of treason. Antiently an appeal of [101] high treason, by one subject against another, was permitted in the courts of common law, and in parliament; and if committed beyond the seas, in the court of the high constable and marshal.³ The method of proceeding against a peer for high treason, is by parliamentary impeachment; but a commoner can only be impeached for high crimes and misdemeanors.

The *indictment* is an accusation at the suit of the king, by the oaths of twelve men of the same county, wherein the offence was committed, who find the bill brought before them to be true. By the common law, no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precincts for which they are returned; therefore they [102] are enabled by several statutes, to inquire of treasons committed out of the county.

In treating of the indictment, will be considered,

1. The

¹ 2 Hale P. C. 44. ² Hawk. P. C. 170.

³ Holt 83. *R. v. Wyndham*, 1 Strange 2.

⁴ The cognizance of appeals in these latter courts, still continues in force. 4 Blac. Com. 314. In 1631, a trial by battle was awarded by the court of chivalry, on an appeal of treason, by Donald Lord Rae, against David Ramsay. 11 Sta. Tri. 124.

1. The Venue. 2. The Charge. 3. The Overt Act. 4. The Conclusion.

Venue.

The *Venue* is the place laid in the indictment where the offence was committed, and from whence the jury are to come to try the fact. It is generally true, that the venue must be laid in that county where the offence was actually committed, unless a statute gives a power to the contrary. If treason is committed in several counties, the venue may be laid in any one of them.¹ If treason is committed out of the realm, the venue may be laid in any county within the realm, where the treason is appointed to be enquired into.²

Wales is within the kingdom of England. But if [103] any treason is committed in Wales, the venue may be changed to the next adjoining county in England, where the king's writs run.³ In *Chedley's case*, who was indicted for petit treason, it was doubted whether a *certiorari* lay to remove the indictment from the grand sessions at Anglesea into an adjoining county.⁴ But it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency; or to plead a pardon; but not as to trial of the fact, but it must be sent down by *mittimus*.⁵

By the 7 An. c. 21. If treason is committed by any native of *Scotland*, upon the high seas, or in any place out of the realm of Great Britain, it may be inquired of in any shire or county, that is assigned by the commission. Therefore the venue may be laid [104] in such county as if the treason was actually committed there.

If

¹ 4 Sta. Tri. 640.

² 2 Hawk. P. C. 304.

³ 1 Hale P. C. 158.

⁴ 4 Blac. Com. 303.

⁵ Cro. Car. 331.

If treason is committed in *Ireland*, it may be laid and tried in England, in pursuance of the 35 Hen. 8. c. 2. This was resolved in Sir John Perrot's case.¹ In the case of Lord *Macguire*, the venue was laid in Middlesex, though the war was levied against the king in Ireland.²

The indictment must be drawn with great form and accuracy: for there can be no conviction of treason, where the crime is not formally laid, even though the facts charged amount to treason.³ The day laid in the indictment is circumstance and form only, and not material in point of proof. Therefore the jury are not bound to find the defendant guilty on that particular day; but may find the treason to be committed either before or after the time laid.⁴

There must be a specific charge of treason. And since the traitorous intent is the *Gist* of the indictment, the treason must be laid to have been committed *traiterously*; this word being indispensibly requisite. If the charge is for compassing the king's death, the words of the 25 of Ed. 3. must be strictly pursued. The indictment must charge, that the defendant did traiterously *compass and imagine, &c.* And then proceed to lay the several overt acts, as the means employed for executing his traitorous purposes. Levying war may be charged as a distinct species of treason, according to the statute; or it may be laid as an overt act of compassing.

[106] There must be an *overt act* laid. It is not necessary that the overt act, be laid to have been committed traiterously, because that is not the offence; but

¹ 1 Sta. Tri. 189. ² Id. 950. ³ 2 Sta. Tri. 808, 809.

⁴ This point was determined in *Syer's case*. 3 Inst. 230. And in *Sir Henry Vane's case*. Kelyng. 19. (3rd edit.).

but if the treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traitorously.¹ It has been doubted, whether an overt act is required for any other species except that of compassing or imagining the king's death:² but since the words of the 25 Ed. 3. "and thereof "be provably attainted by overt act" relate to all the treasons, an overt act is required for each.

Though a specific overt act must be alleged, yet it is not necessary that the whole detail of evidence intended to be given, should be set forth; it is sufficient that the charge be reduced to a reasonable certainty; so that the defendant be apprized of its nature. Neither is it necessary to prove the overt act committed on the particular day laid.³ [107]

As there must be an overt act laid, so that which is laid, must be proved; for if another act than what was laid, was sufficient, the prisoner would never be provided to make his defence. But if more than one are laid, the proof of any one will maintain the indictment. Also if one overt act is proved, others may be given in evidence to aggravate the crime, and render it more probable.⁴

It has been said, that since every overt act of compassing is transitory, it may be proved in a different county, from where the treason is laid.⁵ But in *Layser's* case, Chief Justice Pratt laid it down as clear law, that there must be an overt act proved in the county, where the indictment is laid: and that then, the defendant may be charged with any overt act of the same species of treason, in any county whatsoever.⁶ [108]

The

¹ Cranburn's case, 2 Salk. 633.

² Foster 194. 9 Sta. Tri. 607.

³ Kelyng. 18. (3rd edit.).

⁴ 5 Sta. Tri. 21.

⁵ 1 Hale P. C. 121, 122.

⁶ 6 Sta. Tri. 319.

The compassing is considered as the treason; and the overt act as the method of effecting it. Therefore upon the trial of the regicides, the compassing was charged as the treason, and the taking off the king's head, as the overt act; and the person who was supposed to have given the stroke, was convicted on the same indictment. In this indictment the compassing was laid on the 29 January, 24 of Charles the First, and the murder on the 30th of the same month. It was a question whether the 30th of January, should be laid in the reign of Charles the First, or Charles the Second, since there was no fraction of a day: it was agreed that it should be laid on the 30th day of the same month January; without naming any year of any king.¹

[109]

It was resolved by all the justices, in the case of *Arden* and *Somerville*, that a meeting together of these accomplices to consult touching the manner of effecting the death of Queen Elizabeth, was an overt act to prove the compassing: as also *Somerville's* buying a dagger for the purpose of actually executing the design.²

It is sufficient to lay a consultation to kill the king, as an overt act of compassing his death, without laying the manner in which the king's death was to be effected; for the consultation is in itself an overt act.

Levying war is an overt act of compassing. Sir Henry *Vane* was indicted in the king's bench, for compassing the death of Charles the Second, and the overt act was levying war.³ But a bare conspiracy to levy war is not an overt act, and was so adjudged in

[110]

¹ Kelyng. 11 and 12. (3rd edit.). Foster 193, 194.

² Anderf. Part I. p. 104. ³ Kelyng. 16. (3rd edit.).

in Sir John *Friend's* case. But if it appears, that the design was to kill, depose, or imprison the king, or to put force upon him; and the levying is the ways and means for such purpose, then it is an overt act.¹

Though words alone do not constitute an overt act, this must be understood with qualifications and exceptions. Words may expound an overt act, to make good an indictment for compassing the king's death. And if they expressly menace the death or destruction of the king, they are sufficient overt acts of themselves: but the words must be alleged to be spoken of the king.²

In indictments upon the clause of the statute for levying war, which Sir Matthew Hale calls an obscure clause, it is not necessary to lay the day with precision.³ But there must be an overt act shewn in the indictment, upon which the Court may judge upon the question of fact, whether war is levied or conspired. And this is usually done, by setting forth, that the insurgents were arrayed in a war-like manner; were armed; or were conspiring to procure arms for the purpose of arming themselves.⁴

In an indictment for adhering to the king's enemies,

¹ And this distinction was taken by Lord Holt, upon Sir John *Friend's* trial. 4 Sta. Tri. 625, 626.

² *Stanley's* case in Lord Bacon's *History of Hen. VII.* 2 Shower 413. See several cases for words ante p. 27. William Stayley was executed for words spoken of the king, in *French*. The words in English were, *I would kill him myself*. The prisoner evasively said, the words alluded to himself, *I would kill myself*. 2 Sta. Tri. 656, 657.

³ In Sir Harry Gray's case, all the judges were of opinion, he was guilty, notwithstanding the fact was committed, twelve years before the day laid in the indictment. 9 Sta. Tri. 550.

⁴ 1 Hale P. C. 150.

mies, it must be shewn to whom the adherence was ; that the court may judge whether the persons adhered to, are the king's enemies or not.¹ But it is not necessary to allege that the adhering was against the king ; for this shall be intended.² There must be an adherence to the king's enemies ; therefore if a subject solicits a foreign state in amity with us, to invade the kingdom, this is not an overt act to convict him of adhering to the king's enemies ; though it is of compassing his death.³

[112] There is a difference in indictments against natural Conclusion.
born subjects and aliens. Every indictment whether against a natural born subject or an alien, for an offence declared treason by the 25 Ed. 3. must conclude, that it was done "against the duty of his allegiance." An attainder was reversed, because the indictment ran, that the defendant not considering the duty of his allegiance, did traiterously wage war against the king, &c. : for it was held, that these words do not positively express, but imply only, that the defendant acted against his allegiance ; and indictments shall not be made good by intendments and implications.⁴ But if the offence is made treason by statutes subsequent to the 25 Ed. 3 ; and the offence is charged in the words of the particular statute, it is sufficient if it concludes, against the form of the statute or statutes ; without mentioning allegiance.⁵

[113] An alien *enemy* cannot be *indicted* for treason because the indictment cannot conclude that it was done, against the duty of his allegiance, when in fact he owes the king none at all.⁶ An indictment against an

¹ 2 Vent. 316. Harding's case.

² 5 Sta. Tri. 36.

³ 1 Hale P. C. 167.

⁴ 2 Salk. 630, 631. Tucker's case.

⁵ Id. Ibid.

⁶ Ante p. 14.

an alien *amy* must conclude, against the duty of his allegiance, leaving out natural, otherwise it will be fatal, as being laid too specially; for he may owe the king local but not natural allegiance.¹ Neither is the word *natural* requisite in indictments against [114] natural born subjects.

It was resolved, for the sake of greater certainty, that the indictment against the regicides should conclude, against the peace of our late lord the king, &c. and also against the peace of our present lord the king, &c.²

Misdemeanors and libels against the government may be prosecuted either by indictment or information. An information is a suit commenced immediately by the king, and filed *ex officio* by the attorney general. This is a speedy method of prosecution; without waiting for any previous inquiry and finding by a jury; and is invested in the crown, in consequence of the danger of those high misdemeanors, which directly attack the executive government.

The disturbers of government by libels, are seldom so explicit in their matter, that the stamp of criminality can be fixed, *prima facie*, on their writings. [115] The law therefore, in order to construe the publication according to the intention of the writer, adopts the use of *overments*, which are termed *innuendos*, whose office it is to analyse the matter, and comment on the purport of the libel, and by operating as a copulative, where the matter is dis-joined, and a connection of it essential to the *gist* of the charge, fix the meaning of the language, as it is charged, in reference to the persons or matter alluded to.

Whatever

¹ 4 Sta. Tri. 699, 700. Cranburn's case. See several cases of aliens, quoted in 7 Coke's Rep. Calvin's case, 6. a. b.

² Kelyng. 12. (3rd ed.).

Whatever certainty is required in an indictment ; the same certainty is necessary in an information. Therefore in every indictment or information, for a libel or misdemeanor, by writing or speaking, there must be a specific charge set forth ; a libel may be described either by the sense or substance ; or by the particular words ; and an indictment or information [116] in either of these forms will be good.¹ Upon the trial of Doctor *Sacheverell*, Lord Nottingham put a question to the judges, whether the particular words supposed to be criminal, must not be expressly specified in the indictment or information ; the judges resolved in the affirmative.² But this resolution has been censured by contrary opinions, and cases have been cited where the words were not so specified.³

The whole libel need not be set forth, and if any thing qualifies that which is set forth, it may be given in evidence. It has been agreed, that a libel set out "to the following effect" is naught ; for the court are to judge of the words themselves, and not of the construction the prosecutor puts upon them. But if the word "tenor" follows, it will correct them : "according to the following tenor" imports the very words themselves : for the tenor of a thing is the transcript.⁴ [117]

If the libel is described by the sense and substance, exactness of words is not material. But if by the words, "according to the following tenor" a letter or syllable mistaken is fatal. If however, it is for words spoken, literal omissions are not material ; for there

¹ 8 Sta. Tri. 330.

² 5 Ed. 828.

³ *Staley's case*. 6 Sta. Tri. 330. *R. v. Griepe*, Trin. 8 Wil. 3.

⁴ 2 Salk. 417.

there is no original, with which to compare the words set out.¹

Having thus considered the *ordinary* modes of proceeding by indictment or information; I shall now briefly touch upon the *extraordinary* mode by impeachment.

An impeachment before the lords, by the commons of Great Britain in parliament, is in the nature of a grand bill of indictment, found by the house of commons, and presented to the lords.² But there must be a specific charge made, for the lords refused to commit the earl of *Clarendon*, because there was no particular treason mentioned or assigned.³ The king usually creates a lord high steward by commission under the great seal, before whom the peer is to be tried. A peer cannot waive his trial by peers, and put himself upon the country, that is upon twelve freeholders; for the statute of *Magna Carta* is, that he shall be tried *per pares*.⁴ [118]

If an indictment is found against a lord of parliament, by a grand jury of freeholders in the court of king's bench; or at the assizes before the justices of *oyer and terminer*; it must be transmitted by a writ of *Certiorari*, into the court of parliament: or in it's recess, expressly into the court of the lord high steward.⁵ [119]

Process.

The next thing to be considered is the *process* upon the indictment or information. If the defendant is in custody before the finding of the indictment, the next step is the arraignment. But if he absconds or secretes himself,

¹ 2 Salk. 660, 661. The Queen v. Drake.

² 1 Hale P. C. 349.

³ 2 Sta. Tri. 573.

⁴ 3 Inst. 30. Resolved by all the judges in Lord Dacres's case. Kelyng. 56. (3rd ed.).

⁵ 3 Inst. 38. 3 Woodeson's Laws of England. 593.

himself, still an indictment may be preferred against him in his absence, and if it is found, process issues to bring him into court.

Upon an indictment, the process issues immediately on its being found; but upon an information, it does not issue, till after conviction.

The first process is a *capias*. At common law in cases of treason, there was but one *capias*; and as this has not been altered by statute, upon a *non est inventus* returned, an *exigent* is awarded, in order to proceed to outlawry.¹

[120] But if the indictment is originally taken in the king's bench, the 6 Hen. 6. c. 1. specially provides, that before any *exigent* awarded, the court shall issue a *capias* to the sheriff of the county where the indictment is taken, and another to the sheriff of that county where the defendant is named in the indictment; having six weeks time or more before the return; and after these writs returned the *exigent* to issue as before.²

And by the same statute, if any *exigent* is awarded, or outlawry pronounced, against persons so indicted, it is utterly void.

A *capias* and *exigent* may issue against a lord of parliament: although in civil cases they cannot.³

If the offender is out of the realm, the process is of the same effect, as if he was resident in the realm.⁴

[121] The punishment for outlawries, upon indictments for misdemeanors, is the same as for outlawries in civil actions. But an outlawry in treason amounts to

¹ 2 Hale P. C. 194. ² Id. Ibid. 195. ³ Id. Ibid. 199.

⁴ Com. Dig. tit. Indictment, p. 513. (p. 386 4th Edit.) See the process of outlawry, in Tidd's Practice of the court of King's Bench, part 1. c. 4.

to a conviction and attainder of the offence charged in the indictment, as much as if the offender was found guilty by his country. His life however is under the protection of the law.¹

The next proceeding is the arraignment, but previous to this, and the trial, the prisoner is entitled to many important privileges, conferred upon him by the 7 *Wil.* 3. c. 3; which is the standard for regulating trials, in cases of treason and misprision.

Copy of the indictment, and pannel.

By section 1. of this act, the prisoner is to have a true copy of the whole indictment, but not the names of the witnesses, delivered to him five days at least before the trial; in order to advise with counsel [122] thereupon, to plead and make his defence: if his attorney or agent requires the same, and pays the officer a fee, not exceeding five shillings, for writing the copy of such indictment. And now, since the decease of the late pretender, by 7 An. c. 21. s. 11. a list of the witnesses to be produced on the trial, and of the jurors, impannelled, containing respectively their names, professions, and places of abode, is to be delivered together with the copy of the indictment, to the party indicted, ten days before the trial, in the presence of two or more credible witnesses. Though the act mentions ten days before the trial, yet it must mean before the *arraignment*; because the prisoner pleads *instantly* upon the arraignment.²

At common law no prisoner in capital cases, was allowed a copy of any of the proceedings. Many prisoners have insisted on a copy of the whole indictment, before this privilege was granted, but it was constantly denied them. Lord *Preston* upon his trial insisted it had been granted to Lord *Ruffel*, but
chief [123]

¹ 4 Blac. Com. 319.

² 2 Doug. 590.

chief justice Holt observed, he was counsel for Lord Ruffel, and advised him not to demand it.¹ In the case of *Charnock*, whose trial came on after passing the act, but before it took effect, a copy of the indictment was denied. Charnock insisted he was within the reason and equity of the act; but the court told him, he was tried not by equity, but by law.²

The reason of the copy being delivered is, that the prisoner may know his charge, and accordingly prepare his defence. But he will not be suffered to inspect the rest of the record; or to have the *venire facias* read, which is only to summon the jury, and bring them to the bar.³

Though the act mentions only the copy of the indictment, yet the prisoner ought to have a copy of the *caption* also, which is frequently as necessary for pleading as the other. This is now the constant practice. But if the prisoner pleads without a copy of the caption it is too late to offer an objection.⁴

If there is any objection to the copy, as if it does not appear before whom the indictment was taken, or that it was taken at all, or in what place, this must be objected to before the plea. For the copy is given the prisoner to enable him to plead, therefore, by pleading, he admits that he has had a copy, sufficient for the purpose intended by the act.⁵

[125] The reason of giving the prisoner a copy of the pannel is, that he may enquire into the characters and qualifications of the jury, and make what challenges

¹ 4 Sta. Tri. 416. ² Id. 563. ³ 6 Id. 323, 324.

⁴ Foff. 229, 230. So resolved upon *Gregg's case*, M. S. Rep. 6 Bac. Abr. 544; in other edita. 5 Bac. abrid. 149.

⁵ 4 Sta. Tri. 668.

lenges he thinks fit. But the copy may be delivered *antecedent* to the pannel returned by the sheriff. For if he has a copy of the pannel arrayed by the sheriff, which is afterwards returned into court, and there is no variation from it, the end and intent of the act is entirely pursued.¹

The copy and the pannel must be delivered ten [126] days before the trial, exclusive of the day of delivery and the day of arraignment. These points have been long settled. And if the last day is on a Sunday, it must be exclusive of that day also.²

Counsel.

The prisoner is allowed to make his defence by *counsel*. And the court is authorised to assign him counsel, not more than two in number, who shall have free access to him at all seasonable hours. The counsel are to assist him throughout the trial, to examine his witnesses, and to conduct his whole defence, as well in points of fact, as upon questions of law.

This is a great indulgence. For at common law
no

¹ 4 Sta. Tri. 663, 664. ² Doug. 590. Upon the indictment of Lord George Gordon, upon the motion of the attorney general, a rule was granted for delivering to the prisoner a copy of the indictment, &c. *ten* days before the arraignment, in consequence of the provision of the 7 An. c. 21. s. 11. the rule was drawn up in the following words.

Middlesex,
The King against
George Gordon esq.
commonly called
Lord George Gordon.

“ It is ordered that the sheriff of *Middlesex* do forthwith deliver to Mr. *Chamberlayne*, the solicitor for the prosecutor, a list of the jury *to be returned* by him, for the trial of the prisoner, mentioning the names, professions, and places of abode, of such jurors, in order that such list may be delivered to the prisoner, at the same time that the copy of the indictment is delivered to him—on the motion of Mr. *Attorney General*—by the Court.” ² Doug. 591, in notis.

² Foster 230.

[127] no counsel was allowed upon the general issue, in any capital crime whatever; except some doubtful question of law arose, proper to be debated. In the cases of *Charnock* and others, for the assassination plot, whose trials came on before the act took effect, but after it had passed, counsel was refused.¹ And in *Sir William Parkins's* case, who was tried the day before the act took place, the court refused to assign counsel; observing that they could not alter the law, but were bound to conform to it, as it is at present, not what it will be to-morrow.²

Upon the trial of Lord *George Gordon*, a motion was made that counsel might be assigned the prisoner. Mr. justice Buller doubted whether the application ought not to be made, by the prisoner himself, the words of the statute being "upon his or their request;" But the attorney general consenting, the motion was allowed, and two counsel were assigned.³

[128] Though the benefit of the act of William does not extend to impeachments in parliament, yet by the 20 G. 2. c. 30. it is enacted, that if any person is impeached by the Commons of Great Britain of any high treason, whereby corruption of blood may ensue; or for misprision of such treason; he may make his defence by counsel, not exceeding two, who are to be assigned on application of the parties impeached, at any time after the articles of impeachment are exhibited by the commons.

The *arraignment* is the calling the prisoner to the bar of the court, to answer the matter charged in the indictment. He must be brought to the bar without irons, unless there is danger apprehended of his escape

Arraignment.

¹ 4 Sta. Tri. 563.

² Id. 630.

³ 2 Doug. 591.

escape. *Laver* stood at the bar in irons, but he was called upon only to plead. And the court said, upon his trial he ought not to be *in vinculis*.¹

Upon the arraignment, the indictment being read, [129] it is demanded of the prisoner what he saith to the indictment; who either confesses, stands mute, pleads, or demurs; if he confesses, the court has nothing to do but to record the confession and award judgment. If he stands mute, through obstinacy, it is equivalent to a conviction by verdict or confession.² In the case of *Waller* and *Fleetwood*, the regicides, the clerk had recorded their plea of not guilty; but a confession was afterwards made and allowed by the court.³

Plea.

The defendant then either pleads, or demurs to the indictment. Pleas are to the jurisdiction of the court, in abatement, or in bar.

A plea to the *jurisdiction* is where the indictment is taken before a court, that has no cognizance of [130] the offence. *Fitzharris* in the court of king's bench, pleaded to the jurisdiction of the court, that he was impeached of high treason, by the commons of England in parliament, before the lords, and that the impeachment was still in force. But the court after taking time to consider, held that the plea was insufficient, to bar the court of its jurisdiction.⁴

Lord

¹ *Laver's case* 1722. 6 Sta. Tri. 230, 231.

² 2 Haw. P. C. 457 *et seq.*

³ Kelyng. 13. (3rd ed.).

⁴ 33 Car. 2. 3. Sta. Tri. 259, 260. 4 Id. 167. The objections to the plea were that the prisoner ought to have produced the record of the impeachment, and that as it was a plea of impeachment for high treason generally, it was naught. Neither could the prisoner be admitted to make an averment in the plea, that the treason in the impeachment and that in the indictment was the same.

Lord *Macquire* an Irish peer pleaded his privilege of peerage, but the court resolved he might be tried here.¹

[131] Lord *Preston* pleaded his peerage, at the Old Bailey, as a bar to the jurisdiction; the court told him he must produce his patent of peerage. The plea was over-ruled, for Lord *Preston* had disclaimed his right of peerage in the house of lords.

Lord *Delamere* was indicted for high treason, before the lord high steward, during a prorogation of parliament, and pleaded to the jurisdiction of the court, that as the parliament was not dissolved he ought to be tried by the whole body of the peers; the plea was over-ruled.²

A plea in *abatement* is principally for a *misnomer*. *Martyn*, his name being so written in the indictment, pleaded that his name was *Marten*, but the court agreed that as he was known by the name of *Martyn*, it was sufficient.³

[132] The 7 *Wil.* 3. cap. 3. sec. 9. provides, that the indictment shall not be quashed for mis-writing, mis-spelling, false or improper Latin, unless the exception is taken before any evidence is given.

Pleas in *Bar* are general or special. The general issue is not guilty. Upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short the general issue goes to say, that the prisoner under the circumstances, has not been guilty of the crime imputed to him. Pleas in bar.

In cases of libels, the general issue is not guilty. Upon which the jury may take into consideration,
not

¹ 1 Sta. Tri. 950. 4 Id. 414.

² Id. 212, 215.

³ Kelyng. 11 and 12. (3rd ed.).

not solely the facts arising, but the law also. For the defendant's plea is not confined to the publication of the *innuendos*, but extends to the question, whether the publication be criminal or not.¹

Special pleas in bar are such as preclude the court [133] from discussing the merits of the indictment, either on account of a *former* acquittal, or of some subsequent matter, operating in discharge of the defendant.²

The plea of *autrefois acquit*, or a former acquittal, is a good bar to the indictment, if it is an acquittal for the same treason, and the defendant is the same person. The record of the former indictment and acquittal must be shewn.³ But it is not necessary to produce it immediately; because it is pleaded in bar, and he that pleads it hath neither the custody nor property of it. If there is a variance between the record of the former acquittal, and the indictment [134] which is pleaded to either in time, place, or addition, this may be helped by proper averments.⁴ An acquittal in any court, is a good bar of any subsequent prosecution, even in the highest court; provided the inferior court had a jurisdiction of the cause.⁵

Auterfois convict or *attaint*, a former conviction or attainder, are special pleas in bar, but are never good, except when a second trial would be superfluous.

¹ The 32 Geo. 3. c. 60. is "an act to remove doubts respecting the functions of juries in cases of libels." Now, no doubts have ever existed. The jury might have returned a general verdict upon the whole matter put in issue; and so the court has frequently told them: the law of libels is therefore in *statu quo*.

² 3 Inst. 213. ³ 2 Hale P. C. 241. ⁴ 2 Hawk. P. C. 516.

⁵ Id. ib. 517.

⁶ Id. ib. 522.

[135] ous.¹ A man attainted of treason by outlawry, cannot be indicted *de novo*, for the same treason, till the outlawry is reversed: for *auterfoits attain* of the same treason is a good plea, although the record is erroneous.² An attainder of felony is no bar to an indictment for treason. If a man attainted of felony, commits high treason *before* the attainder, he shall answer nevertheless for the treason; for the king is entitled to forfeitures, and the judgment is different. So also, if he commits treason *after* the attainder; for it is a higher crime.³

A *pardon* may be pleaded in bar, either on the arraignment, or in arrest of judgment, or in bar of execution. By the 13 Ric. 2. stat. 2. c. 1. no pardon of high treason is good, unless the crime is expressly specified. And it was an objection to Sir Walter Raleigh's pardon, that there was no pardon of treason specifically mentioned; and the court could not take it by implication.⁴ But if the king was unapprized of the heinousness of the crime, or how far the party stood convicted on the record, the pardon is void, as obtained by imposition.⁵

[136] If it is a pardon granted by parliament, the court is bound *ex officio* to take notice of it, inasmuch that it cannot proceed against the prisoner, though he does not plead it, but endeavours to waive it; except it appears that the person or crime is excepted in the act.⁶ But a particular pardon under the great seal, must be pleaded specially, and at a proper time. For if a man has a pardon in his pocket, and pleads the general issue, he waives the benefit of it. If he pleads,

¹ Staund. P. C. 107.

² 3 Inst. 212. 213.

³ Ibid.

⁴ 1 Sta. Tri. 227.

⁵ 2 Hawk. P. C. 547.

⁶ Id. ib. 550.

pleads, without producing the pardon, the court may at discretion indulge him a farther day to put in a better plea, when he may perfect the plea, by producing the charter.¹

Ratcliffe being attainted of treason, escaped; but was retaken, brought to the bar and arraigned. Upon which he pleaded, that he was not the person mentioned in the record before the court. This issue was tried by the jury, who gave a verdict, that he was the same person. Upon this, the prisoner offered to plead the act of general pardon. But the court declared, that having once pleaded in bar of execution, and the plea having been falsified by the verdict, it was peremptory; and that the verdict was conclusive.² [137]

A pardon cannot be pleaded in bar to a parliamentary impeachment. When the Earl of *Danby*, in the reign of Charles the Second, was impeached by the house of commons, of high treason and other misdemeanors, he pleaded the king's pardon, as a bar to the impeachment: but the commons resolved, that there was no precedent where a pardon was ever granted, pending an impeachment; and that Lord *Danby's* pardon was illegal and void.³ It was afterwards enacted by the act of settlement, 12 and 13 W. 3. c. 2. "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." But after the impeachment has been heard and determined, the king has then the power of pardoning; for after an impeachment and attainder of the six rebel lords in 1715, three of them were pardoned. [138]

Sir

¹ 2 Hawk. P. C. 551. ² M. 20 Geo. 2. K. B. Foster 41-43.

³ 2 Sta. Tri. 739, 740. 2 Hawk. 547.

Sir H. Vane, justified that what he did was by authority of parliament; that the king was out of possession of the kingdom; and that the parliament was the only governing power. But this was overruled by the court.¹ Neither can a man plead by way of justification, that what he did was *se defendendo*.²

[139] A man may also plead specially the statute of limitations, 7 Wil. 3. c. 3. §. 5. that no man shall be indicted, tried, or prosecuted for any treason, unless within three years after it is committed. There is an exception however in the act, of persons who are guilty of designing, endeavouring, or attempting any assassination of the king, by poison, or otherwise.

A *demurrer* admits the facts stated in the indictment, but refers the law arising upon them, to the determination of the court. As if the prisoner insists that the fact as stated is no treason. Demurrer.

After plea the jurors are sworn, unless challenged by the party.

Challenges are allowed by the law, for the purpose of having an indifferent trial: and are either peremptory, or for cause shewn. Challenge.

[140] A peremptory challenge of thirty-five jurors, is at this day allowable in cases of high treason. For though the 33 Hen. 8. c. 23. enacts, That in cases of high treason or misprision of treason, a peremptory challenge shall not be allowed. Yet the 1 and 2 Phil. and Mar. c. 10. enacts, That all trials for any treason, shall be according to the order and course of the common law, which allowed this privilege.³

But

¹ Kelyng. 17. (3rd ed.).

² 2 Hale P. C. 258.

³ 3 Inst. 27. 2 Hale P. C. 269. 7 and 8 Wil. 3. c. 3. §. 2.

But if a man is outlawed, and brings a writ of error upon the outlawry, and assigns an error in fact, whereupon issue is joined, he cannot challenge peremptorily, or without cause.¹ If the prisoner peremptorily challenges *above* thirty-five, and insists upon it, and will not leave the challenge, it amounts to a *nihil dicit*, and judgment of death may be given.²

Upon the trial of Sir H. Vane, it being suspected that he might challenge peremptorily, and defeat his trial for that day, as there were only twenty-four jurors returned, the sheriff returned sixty. For upon search in the crown office, it appeared that upon trials on the crown side for criminals, the sheriff might be commanded to return any number the court pleased. The like may be done upon a commission of *oyer and terminer*.³ [141]

Upon the trial of the regicides it was resolved, that if several prisoners are put upon one jury, and they challenge peremptorily and sever in their challenges, he who is challenged by one is drawn against all; because the pannel being joint, one juror cannot be drawn against one, and serve for another. It was therefore agreed, to sever the pannel, and return the same jury for every prisoner; and then as they were tried severally, a juror being challenged by one, was not disabled from serving another. And afterwards upon the trial of *Harrison* and others, who challenged peremptorily, and severed in their challenges, particular jurors, the pannel was severed.⁴ [142]

Challenge for cause is to the array or poll.

There ought to be a sufficient number of hundredors

¹ 3 Inst. 27. ² Hale P. C. 267. 7 and 8 Wil. 3. c. 3. §. 2.

³ Id. 268. ⁴ Kelyng. 20. (3rd ed.). ⁵ Id. 10, 11.

dredors returned ; though there is no instance of any challenge for default of hundredors.¹

By the 33 Hen. 8. c. 12. For treasons committed in the king's household, and tried before the lord steward, all challenge, except for malice, is taken away.²

A juror may be challenged for not being a freeholder ; or not having within the same county, freehold or copyhold lands to the clear yearly value of ten pounds.

[143] The 9 Geo. 1. c. 8. Though principally regarding counties at large, has been held to extend to trials in *London* for high treason.³

An *alien* cannot make a challenge to the array, that the jury should be *de medietate*, or half foreigners, this indulgence not being granted in treasons ; for aliens are improper judges of the breach of allegiance.⁴

None of these challenges are allowed in impeachments, or trials by peers. For the peers are not only triers of fact, but in some respects triers of law, and judges.⁵

After the jury are sworn, and the indictment opened, the next step is proceeding to evidence of the charge.

[144] It is enacted by the 7 and 8 Wil. 3. c. 3. s. 2. that no person shall be tried for high treason or misprision, except upon the oaths of two lawful witnesses ; either both of them to the same overt act, or one of them to one, and the other to another overt act

¹ 2 Hale P. C. 272.

² Id. ibid.

³ 6 Sta. Tri. 58, Francia's case. Id. 229. Laver's case.

⁴ So resolved upon the trial of Mary Queen of Scots. Dyer 145. and Sherley's case id.

⁵ 2 Hale P. C. 275.

act of the same treason; unless the prisoner willingly, without violence, in open court, confesses the same; or stands mute; or refuses to plead; or in cases of high treason peremptorily challenges more than thirty-five of the jury.

At common law, one positive witness was sufficient. But several statutes previous to the act of William required two; and upon the trial of the regicides, and upon Lord Stafford's trial, it was a point beyond all doubt that the law required two; and that they must be both believed by the jury. But a collateral fact not tending to the proof of the overt acts, may be proved by one. This difference between the proof of overt acts and of collateral facts was taken by Lord Holt in the case of Captain Vaughan, who called witnesses to prove that he was born in the dominions of the French King; the counsel for the crown called witnesses to prove that he was born in Ireland; and upon Vaughan's counsel insisting that there was but one credible witness to that fact, Holt observed there need not be two witnesses to prove him a subject, because that was not an overt act.¹ [145]

If two distinct heads of treason are alleged in one bill of indictment, one witness produced to prove one of the treasons, and another witness to prove another of the treasons, are not two witnesses to the same treason, according to the intent of the act.

As to the confession, there have been doubts whether the statute requires a confession upon the arraignment of the party; or a confession taken out of court by a person authorized to take such examination. Evidence of a confession proved upon the trial [146]

¹ 5 Sta. Tri. 29.

trial by two witnesses has been held sufficient to convict, without farther proof of the overt acts.¹ This point is however not clearly settled. But such confession out of court is evidence admissible, proper to be left to a jury, and will go in corroboration of other evidence to the overt acts. In the case of Smith who was indicted in June 1709 for adhering to the queen's enemies, alienage was the defence, and his confession, that he was an Englishman born, was allowed to be admissible evidence.

[147] In Sir John *Fenwick's* case, who had been indicted on the oaths of two witnesses at the Old Bailey, but upon the disappearance of one, it being conjectured that the single testimony of the other would not be sufficient to convict him, an act of parliament was made expressly to attain him of treason.²

In an indictment for compassing the king's death, the being armed with a dagger for the purpose of killing the king, was laid as an overt act; and being armed with a pistol for the same purpose, as another overt act; it was held, that proving one overt act by one witness, and the other by a different witness, was good proof by two witnesses within the meaning of the act.

[148] Upon a trial at bar, the evidence of a witness was objected to, because he had judgment of the pillory. But the court held, that as he had been pardoned, he was a new man, and his evidence admissible.³ The king cannot give evidence by his great

Evidence.

¹ M. S. report of John Berwick 1746. Foster 241. It was held sufficient by the judges who sat upon the commission in the North in the same year.

² 5 Sta. Tri. 45, 46. 3 Wil. 3. c. 4.

³ R. v. Crosby, alias Philips, 1 Ld. Raym. 39.

great seal, or *ore tenus*, for he would then give evidence in his own cause.¹

An overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid.² And after the overt act has been proved in the proper county, evidence of overt acts, though done in foreign counties is admissible; and such evidence was given upon most of the trials after the rebellions of 1715 and 1745.³

Hearsay is no evidence. But it may be admitted in corroboration of a witness's testimony.⁴

The informations of justices of the peace in cases of high treason, cannot be read in evidence, because high treason is not within their commission. But Sir Matthew Hale doubts whether they are not allowable to be given in evidence.⁵ [149]

Similitude of hand-writing is of itself no evidence in criminal, though it is in civil cases. The distinction seems to be this; that writing being the life and soul of commerce, the comparison of hands is resorted to as the only distinguishing criterion of the transactions of each individual, and the similarity induces a presumption which is decisive, till overturned by contrary evidence. But in criminal prosecutions, where comparison of hands is the only evidence, since they may be either counterfeited, and are founded on a likeness which may easily fail, there is only one presumption against another, which weighs nothing.⁶

Upon the trial of the seven bishops for a libel, the court was divided in opinion, whether similitude of hands [150]

¹ 2 Hale P. C. 282.

² Foster 9.

³ Id. 10.

⁴ Gilb. Law of Evid. 890. ⁵ Hawk. 596.

⁶ 2 Hale P. C. 286.

⁶ 1 Gilb. Law of Evid. 53.

hands was evidence to prove that the defendants signed the paper charged against them as a libel.¹ The paper so fatal to Algernon Sidney was not proved by any one witness to have been written by him. Therefore, since the reversal of his attainder by act of parliament in 1689, it has been generally holden, that similitude of hand-writing is not of itself evidence in any criminal case, whether capital or not capital. However, papers found in the custody of the prisoner,² and proved to be his hand-writing, by persons who have seen him write, may be read in evidence against him.³

[151] In the king and *Crosby*, upon the defendant's producing the copy of the act of parliament for the reversal of the attainder of Algernon Sidney, evidence by comparison of hands, to prove the writing of treasonable papers, was refused to be admitted. But in this case the king's counsel had no other evidence to produce, therefore it is no exception to the rule laid down.⁴

The same rules of evidence are observable in cases of parliamentary impeachments, as in the ordinary courts of judicature.

The prisoner is entitled by the act to have a similar process of the court to compel witnesses to appear for him, to that which is usually granted to compel witnesses to appear against him. And by the 1 An. stat. 2. c. 9. s. 3. the witnesses on the behalf of the prisoner, before they give evidence, are to take an oath to depose the whole truth, &c. as the witnesses for the crown are obliged to do. And if convicted

¹ 4 Sta. Tri. 342. 345. ² 2 Hawk. P. C. 597.

³ 1 Burr. 644. *Henley's case*. See also several other cases there cited. ⁴ 1 Ld. Raym. 40.

convicted of wilful perjury in their evidence, they shall suffer the usual punishment.

Verdict. The jury must be unanimous, and give their verdict in open court. No privy verdict can be given.¹ [152]

Upon the trial of peers, in the court of the lord high steward a major vote is sufficient either to acquit or condemn; provided that vote amount to twelve or more.² Therefore it has been usual to summon not less than twenty-three peers. The lord high steward had formerly a power of summoning as many as he thought proper, and those only that were summoned sat upon the trial, but this throwing too great a power into the hands of the crown; the 7 Will. 3. c. 3. s. 11. enacts, that upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament, shall be duly summoned, twenty days at least, before every such trial, to appear and vote thereon. And every lord appearing shall vote at the trial, first taking the oaths of allegiance and supremacy, and subscribing the declaration against Popery. But the act does not extend to any impeachment or other proceedings in parliament. [153]

These last words of the act are very general, and may seem to exclude every proceeding in full parliament, for the trial of a peer in the ordinary course of justice. But that construction was rejected in the cases of the Earls of Kilmarnock and Cromartie, and Lord Balmerino, the lord high steward informed them they were intitled to the benefit of the act in its full extent. By voting is meant, voting throughout the trial, as a competent judge upon every question that arises, and particularly in the grand question

¹ 2 Hale P. C. 300.

² Kelyng. 89. (3rd ed.).

question of condemnation or acquittal. Upon this last question, being a case of blood, the bishops have no vote. This act therefore does not extend to give the lords spiritual a right, which they never had before.¹

[154] After the trial and conviction unless the prisoner Judgment.
has any thing to offer in *arrest* of judgment, the judgment of the court is awarded. We have already noticed what these judgments are. Upon judgments of death or outlawry, the prisoner is attainted.

The consequences of attainder are forfeiture of all lands and tenements; and corruption of blood. Corruption of blood annihilates the powers of inheritance both as to the offender and as to others. But the 17 Geo. 2. c. 39. §. 3. enacts that after the death of the sons of the late pretender, no attainder of treason shall extend to the disinheriting any heir, nor to the prejudice of any other person, except the offender himself.

¹ Foster 247, 248.



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